Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-91–10 OF 2018 (W)
AZAHAR MOHAMED CJ (MALAYA), DAVID WONG CJ (SABAH AND SARAWAK), ALIZATUL KHAIR, ZAWAWI SALLEH AND IDRUS HARUN FCJJ
31 JANUARY 2020

Civil Procedure — Appeals — Appeal against decision of High Court allowing amendment of re-amended statement of claim — Whether order made by High Court appealable — Whether right to appeal in civil matters under s 67 of the CJA subject to definition of 'decision' as found in s 3 of the CJA — Whether ruling made by High Court finally disposes of the rights of parties — Whether definition of 'decision' in s 3 of the CJA applies to civil appeals — Whether defendants' appeal against decision of High Court incompetent and not properly brought before court of Appeal

Civil procedure — Jurisdiction — Court of Appeal — Appeal to Court of Appeal from High Court — High Court allowed amendment of reamended statement of claim — Court of Appeal allowed appeal — Whether order made by High Court was appealable — Whether Court of Appeal had jurisdiction to hear and determine appeal — Whether Court of Appeal committed jurisdictional error when it heard appeal — Whether Court of Appeal breached s 3 of the CJA — Whether courts have inherent jurisdiction to set aside orders on grounds of want of jurisdiction at appellate stage

Statutes — Interpretation — Whether 'decision', 'judgment' or 'order' excludes a ruling made in the course of a trial or hearing that does not finally dispose of the rights of the parties — Whether s 67(1) read with ss 3 and 68(1) of the CJA precluded litigant's right of appeal against High Court decision in an amendment application made in the course of trial that does not finally dispose of the rights of parties — Doctrine of stare decisis — Whether Federal Court is bound by its own previous decisions — Whether Federal Court should follow Kempadang's case

Asia Pacific Higher Learning Sdn Bhd ('the plaintiff'), which owns and operates Lincoln University College, filed a writ action against Majlis Perubatan Malaysia and Prof Dato' Dr Wan Mohamed Bebakar ('the first and second defendants to the action') in the High Court. The plaintiff alleged, inter

alia, that the defendants were liable for the torts of breach of statutory duty and misfeasance in public office arising from the alleged wrongful action by the Minister of Health in cancelling the medical degree programmes offered by the plaintiff and for reducing the student quota for another medical degree programme also offered by the plaintiff, from 100 students to 70 students. Subsequently, the plaintiff filed an application to amend its reamended statement of claim to add a claim for special damages in the sum of RM579,992,400 in relation to the cancellation of the medical degree programmes offered by the plaintiff. The High Court allowed the application. The defendants appealed to the Court of Appeal, which allowed the appeal. This appeal has been brought by the plaintiff against that decision with the leave of this court. In the meantime, the High Court had allowed the plaintiff's claim on liability in respect of torts of negligence, breach of statutory duty and misfeasance in public office and the plaintiff's application for assessment of damages has been fixed for case management pending the outcome of this appeal. At the appeal, the plaintiff/appellant raised a preliminary issue. The issue was whether the order made by the High Court in allowing the appellant's application to amend the re-amended statement of claim is appealable. Essentially the plaintiff, instead of proceeding with the main appeal, submitted that the Court of Appeal's order that reversed the High Court's ruling was a nullity as it was made in breach of s 3 of the Courts of Judicature Act 1964 ('the CJA') and was thus in excess of jurisdiction. It was therefore the plaintiff's case that the order allowing the amendment was not appealable and the Court of Appeal's order should therefore be set aside. The defendants argued that the preliminary issue had never been raised in the court below and was only raised for the first time before this court on the hearing of the full appeal. The defendants also submitted that the decision of the High Court is appealable because the High Court's decision in allowing the appellant's amendment application was given at the conclusion of the hearing of an interlocutory application on its merits.

Held, allowing the appeal with costs:

(1) (**per Azahar Mohamed CJM, supporting**) The doctrine of stare decisis dictates that as a matter of a general rule of great importance the Federal Court is bound by its own previous decisions. However, there are exceptional circumstances that allow it to depart from the earlier decision, but such power must be used sparingly. It is important to note that in *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd* [2019] 4 MLJ 614 ('Kempadang's case') concerns the interpretation of a statutory provision, namely s 67(1) of the CJA. In the present appeal, it is important not to depart from *Kempadang*'s case primarily because the rules of statutory interpretation have been well applied by Justice Zainun Ali in that case. Hence, the judgment in *Kempadang*'s case, which is the decision of this court, represents the law on the subject matter as it should

be applied today (see paras 13 & 17–18)

(2) (**per Azahar Mohamed CJM, supporting and Idrus Harun FCJ, majority**) The right to appeal in civil matters under s 67 of the CJA is subject to the definition of 'decision' as found in s 3 of the CJA. Although s 67(1) of the CJA provides that the Court of Appeal has jurisdiction to determine appeals from any 'judgment' or 'order' of any High Court in civil matters, it is clear from a plain reading of s 3 of the CJA that a 'decision', 'judgment' or 'order' excludes a ruling made in the course of a trial or hearing that does not finally dispose of the rights of the parties. Further, the Federal Court in *Kempadang*'s case held that it was clear and unambiguous that the definition of 'decision' as per s 3 was applicable to civil appeals inasmuch as it applied to criminal appeals. Hence, the uncertainty on whether s 3 applied to civil appeals in the absence of the word 'decision' in s 67(1) has been laid to rest in *Kempadang*'s case where the Federal Court held that the principles underlying the application of s 3 in criminal appeals were applicable in civil appeals. The decision is a clear authority to support the proposition that s 67(1) read with s 3 and s 68(1) of the CJA precluded a litigant's right of appeal against a High Court decision in an amendment application made in the course of trial that does not finally dispose of the rights of parties. Otherwise, it would allow parties in civil matters to circumvent the restrictions imposed by the definition of 'decision' in s 3 of the CJA and thereby appeal against every decision of trial court, which would indisputably delay the administration of justice. At the same time it is important to realise that reading s 68 with s 3 of the CJA to limit the jurisdiction of the Court of Appeal to hear and determine civil appeals would accord with the constitutionally entrenched principle that the Court of Appeal's jurisdiction is intended to be narrowly defined. As such, the reason for reading the additional exclusion to the jurisdiction of the Court of Appeal is within the four corners of the Act in the form of the definitions of 'decision', 'cause', 'matter', 'action' and 'proceeding' as well as the presence of the words 'judgment' and 'order' in the definition of 'decision' and ss 67–68 of the Act. On the other hand, declining to read s 3 as instilling an additional exclusion of the appellate jurisdiction of the Court of Appeal would offend the rule that permits additional words to be read into statutory provisions to prevent an absurdity from resulting. As such, the decision made by the High Court in the amendment application was not appealable. Since the decision of the High Court in the amendment application was not appealable, the defendants' appeal against the decision of the High Court was incompetent and not properly brought before the Court of Appeal. Therefore, the Court of Appeal had no jurisdiction to hear and determine the appeal and it committed a jurisdictional error when it heard the appeal (see paras 6, 11, 19, 101, 115–116, 135, 137 & 139).

(3) (**per Azahar Mohamed CJM, supporting and Idrus Harun FCJ, majority**) As a general rule, a judicial decision made in want of jurisdiction or in breach of statute would be considered a nullity that is amenable to review at any stage of the proceedings and the court has inherent powers to set aside non-appealable orders exercisable on its own motion even if parties did not raise objections as to want of jurisdiction. Accordingly, while the respondents were quite correct to regard the preliminary issue as being raised at the eleventh hour, there was no merit in the respondents' argument that the preliminary point had to be raised in the intermediate appellate courts below for this court to be entitled to hear it. The issue of whether a decision is appealable is a jurisdictional matter. It concerns the jurisdiction of the Court of Appeal, and a question of jurisdiction can be raised at any time. In any case, this court was not precluded from inquiring into issues which were not part of the leave questions when those issues were legitimately concerned with the issue of jurisdiction. It is settled law that courts have the inherent jurisdiction to set aside orders or judgments that are null and void on the grounds of want of jurisdiction whether at appellate stage or otherwise (see paras 5 & 106–107).

(4) (**per David Wong CJ (Sabah and Sarawak), dissenting**) A proper and wholesome interpretation of s 3 of the CJA against ss 67–68 of the same discloses that s 3 does not apply to civil appeals. It is neither incorrect nor unreasonable to say that s 3 of the CJA is the limitation on the Court of Appeal's jurisdiction to determine criminal appeals and for that limitation not to apply to civil appeals. This is because, matters that are non-appealable are expressly provided for under s 68 of the CJA. The existence of s 68 of the CJA and the absence of the word 'decision' therein together with the failure to delete the words 'judgment' and 'order' in s 3 and to substitute those words with 'decision' go to show that s 3 of the CJA was never meant to operate to limit the civil appellate power of the Court of Appeal. Hence, without a doubt by omitting the word 'decision' in the relevant provisions, the Legislature intended for s 3 to apply only to criminal appeals under s 50 of the CJA, to the exclusion of s 67 of the CJA. This statutory construction is in line with the legislative intent behind the provisions. For all intents and purposes, s 68 is the more specific provision and trumps the application of s 3 on the restriction of civil appeals (see paras 24, 48 & 50–51).

[Bahasa Malaysia summary

Asia Pacific Higher Learning Sdn Bhd ('plaintif'), yang memiliki dan menjalankan operasi University College, telah memfailkan tindakan writ terhadap Majlis Perubatan Malaysia dan Prof Dato' Dr Wan Mohamed Bebakar ('defendan-defendan pertama dan kedua dalam tindakan') di Mahkamah Tinggi. Plaintif mengatakan, antara lain, bahawa

defendan-defendan bertanggungjawab untuk tort bagi pelanggaran kewajipan statutori dan misfeasans dalam jawatan awam yang timbul daripada dakwaan tindakan salah laku oleh Menteri Kesihatan kerana membatalkan program ijazah perubatan yang ditawarkan oleh plaintif dan kerana mengurangkan kuota pelajar untuk program ijazah perubatan lain yang juga ditawarkan oleh plaintif, daripada 100 orang pelajar kepada 70 orang pelajar. Berikutan itu, plaintif telah memfailkan permohnan untuk penyataan tuntutan yang dipinda semula untuk menambah tuntutan bagi ganti rugi khas berjumlah RM579,992,400 berkaitan pembatalan program ijazah perubatan yang ditawarkan oleh plaintif. Mahkamah Tinggi telah membenarkan permohonan itu. Defendan-defendan telah merayu kepada Mahkamah Rayuan, yang membenarkan rayuan itu. Rayuan ini telah dimulakan oleh plaintif terhadap keputusan tersebut dengan kebenaran mahkamah. Sementara itu, Mahkamah Tinggi telah membenarkan tuntutan plaintif berhubung liability berkaitan tort kecuaian, pelanggaran kewajipan statutori dan misfeasans dalam jawatan awam dan permohonan plaintif untuk taksiran ganti rugi telah ditetapkan untuk pengurusan kes sementara menunggu keputusan rayuan ini. Semasa rayuan, plaintif/perayu telah menimbulkan isu permulaan. Isu adalah sama ada perintah yang dibuat oleh Mahkamah Tinggi yang membenarkan permohonan perayu untuk meminda penyataan tuntutan yang dipinda semula boleh dirayu. Pada dasarnya plaintif, bukannya meneruskan dengan rayuan utama, telah berhujah bahawa perintah Mahkamah Rayuan yang mengakas keputusan Mahkamah Tinggi adalah terbatal kerana ia dibuat melanggari s 3 Akta Mahkamah Kehakiman 1964 ('AMK') dan oleh itu melampaui bidang kuasa. Oleh demikian ia adalah kes plaintif bahawa perintah yang membenarkan pindaan tersebut tidak boleh dirayu dan perintah Mahkamah Rayuan dengan itu diketepikan. Defendan-defendan berhujah bahawa isu permulaan itu tidak ditimbulkan di mahkamah bawahan dan hanya ditimbulkan buat kali pertama di hadapan mahkamah ini semasa perbicaraan rayuan penuh. Defendan-defenden juga berhujah bahawa keputusan Mahkamah Tinggi boleh dirayu kerana keputusan Mahkamah Tinggi membenarkan permohnan pindaan perayu telah diberikan pada akhir perbicaraan permohonan interlokutori berdasarkan meritnya.

Diputuskan, membenarkan rayuan dengan kos:

(1) (**oleh Azahar bin Mohamed HBM, menyokong**) Doktrin stare decisis menentukan bahawa sebagai suatu pekara mengenai rukun am yang penting, Mahkamah Persekutuan terikat dengan keputusannya yang terdahulu. Walau bagaimanapun, terdapat keadaan yang luar biasa yang membolehkannya ia menyimpang daripada keputusan yang terdahulu, tetapi kuasa tersebut mesti digunakan dengan berhemat. Adalah penting untuk ambil perhatian bahawa kes *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd* [2019] 4 MLJ 614 ('kes *Kempadang*') berhubung tafsiran peruntukan undang-undang, iaitu s 67(1) AMK.

Dalam rayuan ini, adalah penting untuk tidak menyimpang daripada kes *Kempadang* terutamanya kerana peraturan tafsiran statutori telah terpakai dengan baik oleh Hakim Zainun Ali dalam hal itu. Oleh itu, penghakiman dalam kes *Kempadang*, yang merupakan keputusan mahkamah ini, mewakili undang-undang mengenai perkara yang sepatutnya terpakai pada hari ini (lihat perenggan 13 & 17–18).

(2) (**oleh Azahar Mohamed HBM, menyokong dan Idrus Harun HMP, majoriti**) Hak untuk merayu dalam perkara sivil di bawah s 67 AMK adalah tertakluk kepada tafsiran 'keputusan' sebagaimana didapati dalam s 3 AMK. Walaupun s 67(1) AMK memperuntukkan bahawa Mahkamah Rayuan mempunyai bidang kuasa untuk menentukan rayuan daripada mana-mana 'penghakiman' atau 'perintah' mana-mana Mahkamah Tinggi dalam perkara sivil, ia adalah jelas daripada pembacaan biasa s 3 AMK bahawa suatu 'keputusan', penghakiman' atau 'perintah' mengecualikan suatu keputusan dibuat semasa perbicaraan atau pendengaran yang akhirnya tidak melupuskan hak piha-pihak. Selanjutnya, Mahkamah Persekutuan dalam kes *Kempadang* memutuskan bahawa ia adalah jelas dan tidak taksa bahawa tafsiran 'keputusan' seperti dalam s 3 boleh terpakai kepada rayuan sivil sebagaimana ia boleh terpakai kepada rayuan jenayah. Justeru, ketidakpastian berhubung sama ada s 3 terpakai kepada rayuan sivil dengan ketiadaan perkataan 'keputusan' dalam s 67(1) telah dibincangkan dalam kes *Kempadang* di mana Mahkamah Persekutuan memutuskan bahawa prinsip yang mendasari permohonan s 3 dalam rayuan jenayah adalah boleh terpakai dalam rayuan sivil Keputusan itu adalah autoriti jelas untuk menyokong cadannan bahawa s 67(1) dibaca bersama s 3 dan s 68(1) AMK menghalang hak rayuan litigan terhadap keputusan Mahkamah Tinggi dalam permohonan pindaan yang dibuat dalam proses perbicaraan yang tidak akhirnya melupuskan hak pihak-pihak. Jika tidak, ia akan membenarkan pihak-pihak dalam perkara sivil untuk menghalang sekatan yang dikenakan oleh tafsiran 'keputusan' dalam s 3 AMK dan dengan itu merayu terhadap setiap keputusan mahkamah perbicaraan, yang akan melambatkan pelaksanaan keadilan. Pada masa yang sama adalah penting untuk menyedari bahawa bacaan s 68 dengan s 3 AMK untuk menghadkan bidang kuasa Mahkamah Rayuan untuk mendengar dan menentukan rayuan sivil akan selaras dengan prinsip perlembagaan yang kukuh bahawa bidang kuasa Mahkamah Rayuan bermaksud untuk memberi tafsiran yang tidak luas. Oleh itu, alasan untuk membaca pengecualian tambahan kepada bidang kuasa Mahkamah Rayuan adalah dalam Akta melalui tafsiran 'keputusan', 'sebab', 'perkara', 'tindakan' dan 'prosiding' serta kehadiran perkataan-perkataan 'penghakiman' dan 'perintah' dalam tafsiran 'keputusan' dan ss 67–68 AMK. Sebaliknya, keengganan untuk membaca s 3 sebagai memberikan pengecualian tambahan bidang kuasa

rayuan Mahkamah Rayuan akan melanggar peraturan yang membenarkan kata-kata tambahan dibaca ke dalam peruntukan statutori untuk mengelakkan suatu yang tidak masuk akal terhasil. Oleh itu, keputusan yang dibuat oleh Mahkamah Tinggi dalam permohonan pindaan tidak boleh dirayu. Memandangkan keputusan Mahkamah Tinggi dalam permohonan pindaan tidak boleh dirayu, rayuan defendan terhadap keputusan Mahkamah Tinggi adalah tidak kompeten dan tidak dibawa ke hadapan Mahkamah Rayuan dengan betul. Oleh itu, Mahkamah Rayuan tidak mempunyai bidang kuasa untuk mendengar dan menentukan rayuan itu dan ia telah melakukan suatu kesalahan dari segi bidang kuasa apabila ia mendengar rayuan itu. (lihat perenggan 6, 11, 19, 101, 115–116, 135, 137 & 139).

(3) (**oleh Azahar Mohamed HBM, menyokong dan Idrus Harun HMP, majoriti**) Sebagai rukun am, keputusan kehakiman yang memerlukan bidang kuasa atau melanggar undang-undang adalah dianggap sebagai pembatalan yang boleh dikaji semula pada mana-mana peringkat prosiding dan mahkamah mempunyai kuasa untuk mengetepikan perintah yang tidak boleh dirayu atas usulnya sendiri walaupun pihak-pihak tidak menimbulkan bantahan kerana memerlukan bidang kuasa. Oleh itu, di mana responden agak betul untuk mempertimbangkan isu permulaan yang ditimbulkan pada peringkat akhir, tiada merit dalam hujah responden bahawa isu pendahuluan perlu dibangkitkan di mahkamah rayuan pertengahan bawahan agar mahkamah ini berhak mendengarnya. Isu sama ada keputusan boleh dirayu adalah suatu perkara mengenai bidang kuasa. Ia melibatkan bidang kuasa Mahkamah Rayuan, dan persoalan bidang kuasa boleh ditimbulkan pada bila-bila masa. Walau apa pun, mahkamah ini tidak dihalang daripada menyoal isu-isu yang bukan sebahagian daripada persoalan kebenaran apabila isu-isu tersebut secara sah mengambil berat tentang isu bidang kuasa. Adalah undang-undang tetap bahawa mahkamah memiliki bidang kuasa sedia ada untuk mengetepikan perintah atau penghakiman yang terbatal dan tidak sah atas alasan memerlukan bidang kuasa sama ada pada peringkat rayuan atau sebaliknya (lihat perenggan 5 & 106–107).

(4) (**oleh David Wong Dak Wah HB (Sabah dan Sarawak), menentang**) Tafsiran s 3 AMK yang wajar dan menyeluruh terhadap ss 67–68 yang sama menunjukkan bahawa s 3 tidak terpakai kepada rayuan sivil. Ia tidak salah atau tidak munasabah untuk mengatakan bahawa s 3 AMK adalah had ke atas bidang kuasa Mahkamah Rayuan untuk menentukan rayuan jenayah dan bagi had itu tidak terpakai untuk rayuan sivil. Ini kerana, perkara-perkara yang tidak boleh dirayu telah diperuntukkan secara jelas di bawah s 68 AMK. Kewujudan s 68 AMK dan ketiadaan perkataan 'keputusan' di dalamnya beserta dengan kegagalan untuk memotong perkataan 'penghakiman' dan 'perintah' dalam s 3 dan untuk

menggantikan perkataan-perkataan itu dengan 'keputusan' dengan itu menunjukkan babhawa s 3 AMK tidak pernah dimaksudkan untuk beroperasi bagi mengehadkan kuasa rayuan sivil Mahkamah Rayuan. Oleh itu, tanpa ragu dengan tidak memasukkan perkataan 'keputusan' dalam peruntukan yang berkaitan, badan perundangan mempunyai niat untuk s 3 hanya terpakai bagi rayuan jenayah di bawah s 50 AMK, dengan pengecualian s 67 AMK. Penggubalan statutori ini selari dengan niat perundangan di sebalik peruntukan tersebut. Bagi semua maksud dan tujuan, s 68 adalah peruntukan yang lebih spesifik dan mengetepikan permohonan s 3 mengenai sekatan rayuan sivil (lihat perenggan 24, 48 & 50–51).]

Cases referred to

Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v PP [2014] 6 MLJ 831, FC (refd)

All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 6 MLJ 97, HC (refd)

Anthony @ Alexander Ak Banyan v Bodco Engineering & Construction Sdn Bhd & Anor [2011] MLJU 833; [2011] 1 LNS 1282, HC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Baring Futures (singapore) Pte Ltd (in liquidation) v Deloitte & Touche (A Firm) & Anor [1997] 3 SLR 312, HC (refd)

Chan Yock Cher v Chan Teong Peng [2005] MLJU 673, FC (refd)

Chiu Wing Wa & Ors v Ong Beng Cheng [1994] 1 MLJ 89, SC (refd)

Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party) [2016] 4 MLJ 100, CA (refd)

Co-Operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313, FC (refd)

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)

Dato' Seri Anwar bin Ibrahim & Anor v PP [2000] 3 MLJ 638, CA (refd)

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Datuk TP Murugasu v Wong Hung Nung [1988] 1 MLJ 291, SC (refd)

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Dr Koay Cheng Boon v Majlis Perubatan Malaysia [2012] 3 MLJ 173, FC (refd)

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A *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1, FC (distd)
Indrani a/p Rajaratnam & Ors v Fairview Schools Bhd [2001] 4 MLJ 56, CA (refd)
Karpal Singh a/l Ram Singh v PP [2012] 5 MLJ 293, FC (refd)
B *Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd* [2000] MLJU 537, HC (refd)
Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd [2019] 4 MLJ 614; [2019] 4 CLJ 131, FC (folld)
Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94;
C [1997] 1 CLJ 636, FC (refd)
Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789, SC (refd)
MCAT Gen Sdn Bhd v Celcom (Malaysia) Berhad [2007] 8 MLJ 277; [2007]
D 10 CLJ 356, HC (refd)
Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2019] MLJU 742, FC (refd)
Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2018] 4 MLJ 496, CA (refd)
E *Merck Sharp & Dohme Corp & Anor v Hovid Bhd* [2019] 12 MLJ 66; [2019] 9 CLJ 1, FC (refd)
Mukhtiar Singh Gill & Ors v Atma Singh Gill [1989] 1 MLJ 97, HC (refd)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324; [1983] CLJ Rep 300, FC (distd)
F *Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97, FC (refd)
Pentadbir Tanah Kuala Selangor lwn Maybank Islamic Berhad (Menteri Besar Selangor, intervener) dan lain-lain [2015] MLJU 2177; [2015] 9 CLJ 197, CA (refd)
G *Raja Kumar A/l Andy & 2 Ors v Namgayee A/p Alagan & Anor* [2009] MLJU 320; [2009] 5 CLJ 189, CA (refd)
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Seabance Ge Capital Sdn Bhd lwn Dynabuilders Sdn Bhd dan satu lagi [2002] 5
H MLJ 152, HC (refd)
See Teow Chuan & Anor v Dato' Anthony See Teow Guan [2006] 3 MLJ 97, HC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)
I *Shorga Sdn Bhd v Amanah Raya Bhd (as administrator of the estate of Raja Nong Chik bin Raja Ishak, deceased)* [2004] 1 MLJ 143, HC (refd)
Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd) [2002] 4 MLJ 113, CA (refd)
Sitrac Corp Sdn Bhd v Lim Siew Eng [2002] 3 MLJ 315, HC (refd)

Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor [2007] 6 MLJ 581, FC (refd)
Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495, CA (refd)
The Bengal Immunity Company Limited v The State of Bihar [1955] 2 SCR 603 (refd)
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Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd [1999] 2 MLJ 696; [1999] 3 CLJ 377, CA (not folld)
United Overseas Bank (M) Sdn Bhd v UJA Sdn Bhd [2009] 6 MLJ 857, CA (refd)
Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449, SC (refd)
Vickers, Sons and Maxim Limited v Evans [1910] AC 444, HL (refd)
Wong Kie Chie & Ors v Kathryn Ma Wai Fong (as the personal representative, executrix and trustee of the estate of the late Wong Kie Nai) & Anor and other appeals [2017] 3 MLJ 350; [2017] 5 CLJ 707, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 4, 50, 67, 67(1), 68, 68(1)(d), (2), (3), 69(2), (5), 78, Parts 1, 2, 3, 4
Federal Constitution art 121(1B)
Rules of Court 2012 O 4, O 20 r 5
Rules of the Court of Appeal r 12
Supreme Court of Judicature Act [SG] s 34(1), Fourth Schedule, para 1, 1(i), Fifth Schedule

Appeal from: Civil Appeal No W-02(IM)(NCVC)-1432–07 of 2017 (Court of Appeal, Putrajaya)

Steven Thiru (Gerard Lourdesamy, Gregory Das, Jeremiah Rais and AC Devi with him) (Gerard Samuel & Assoc) for the appellant.
Mohd Hafarizam Harun (Nor Emelia Mohd Iszeham with him) (Hafarizam Wan & Aisha Mubarak) for the respondents.

Azahar Mohamed CJ (Malaya) (delivering supporting judgment of the court):

[1] I have read the judgment in draft of my learned brother Justice Idrus Harun. I agree with the opinion expressed on the issues raised and the conclusion arrived at by His Lordship.

[2] I have also read the judgment in draft of my learned brother Justice David Wong Dak Wah. With due respect, I am unable to agree with his reasons and conclusions.

[3] I wish to express my views for supporting the conclusion arrived at by Justice Idrus Harun.

[4] It is not disputed that the applicant's application to amend the statement of claim was made in the High Court in the course of the trial, after six witnesses of the appellant gave evidence. It is also not disputed that the application by its very nature did not finally dispose of the rights of either party.

[5] It is against the above background, we have to decide on this fundamental question: whether the High Court's decision on an amendment application was appealable to the Court of Appeal. The issue of whether a decision is appealable is a jurisdictional matter. It concerns the jurisdiction of the Court of Appeal, and a question of jurisdiction can be raised at any time. The Federal Court in *Chan Yock Cher v Chan Teong Peng* [2005] MLJU 673 accepted that a jurisdiction error would arise where a court pronounces upon a lower court decision that was not appealable. The decision of the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 established the proposition of law that courts have the inherent jurisdiction to set aside orders or judgments that are null and void on the grounds of want of jurisdiction whether at appellate stage or otherwise.

[6] The right to appeal in civil matters under s 67 of the Courts of Judicature Act 1964 ('the CJA') is subject to the definition of 'decision' as found in s 3 of the CJA. Section 67(1) of the CJA provides that the Court of Appeal has jurisdiction to determine appeals from any 'judgment' or 'order' of any High Court in civil matters:

> 67 Jurisdiction to hear and determine civil appeals
>
> (1) *The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought*. (Emphasis added.)

[7] The construction of the word 'decision' is a matter of importance in this case. While the term 'decision' is not expressly used in s 67(1), the words 'judgment' and 'order' are contained in the definition of 'decision' in s 3 of the CJA:

> 'Decision' means judgment sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties;

[8] The Federal Court in *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd* [2019] 4 MLJ 614 clarified that the use of the words 'judgment' and

'order', rather than the s 3 defined 'decision' in s 67(1), was intended to exclude 'sentence' as it is not a form of decision made in a civil matter. The Federal Court held that it was clear and unambiguous that the definition of 'decision' as per s 3 was applicable to civil appeals in as much as it applied to criminal appeals:

> [32] It bears repeating that the words 'judgment' and 'order' are not defined in s 3 of the CJA. Nevertheless they appear in s 3, to form the meaning of 'decision'. The omission of the word 'decision' in sub-s 67(1) of the CJA is capable of being understood. Section 3 says that 'decision' means judgment, sentence or order ...'. It is seen that by the words 'judgment' and 'order', sub-s 67(1) indicates the form a 'decision' will take in s 3 of the CJA where the word 'sentence' is absent. This is appropriate since a civil court does not impose a sentence in its decision. A sentence is a decision given by a judge sitting in a criminal court upon conviction of a criminal charge. Thus the words in sub-s 67(1) are clear and unambiguous and the court must give effect to its meaning.

[9] Hence, the uncertainty on whether s 3 applied to civil appeals in the absence of the word 'decision' in s 67(1) has been laid to rest in *Kempadang* where the Federal Court held that the principles underlying the application of s 3 in criminal appeals were applicable in civil appeals:

> [39] In the case of *Dato' Seri Anwar Ibrahim* at p 595 (MLJ); p 636 (CLJ) the court pointed out the underlying reasons for the amendment to the definition of 'decision' in s 3 of the CJA which came into effect on 31 July 1998 in the following manner:
>
> > The underlying reason behind the amendment to the definition of 'decision' in s 3 of the CJA is to stop parties from stalling before a trial court by filing appeal after appeal on rulings made by the trial court in the course of a trial. Apart from that the definition of 'decision' by itself is sufficiently clear and it is the court's duty to give effect to the same. Justice demands that cases should move without unnecessary interruption to their final conclusion. That is what the amendment seeks to achieve as evident from the explanatory statement to the Bill, which reads:
> >
> > 2. Clause 2 seeks to amend section 3 of Act 91.
> >
> > At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This cause a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts. Quite apart from the explanatory statement to the Bill the definition of "decision" by itself to our mind, is sufficiently clear and it is the duty of the court to give effect to the same. Justice demands that cases should move without unnecessary interruption to their final in conclusion. That is what the amendment seeks to achieve. The right of a party who is aggrieved by a ruling, after all, is not being

compromised, as the party can always raise the issue during the appeal, if any, to be filed after the trial process is brought to its conclusion.

[40] At this juncture, it is noted that the decision of the Court of Appeal in *Tycoon Realty Sdn Bhd* which was relied on by *Perkayuan* failed to give regard to the purposive and literal construction of sub-s 67(1) and s 3 of the CJA.

[10] The Federal Court in *Kempadang* further held that the definition of s 3 acts as an additional exclusion of the types of matters that cannot be appealed against. The Federal Court's opinion on this, which I accept as a correct statement of law, reads as follows:

[26] Civil matters which are not appealable to the Court of Appeal am listed in sub-s 68(1). For instance, there can be no appeal against a judgment or order made by consent of parties or a judgment or order, which has been declared final by a statute. Another restriction to appeal can be discerned from the provision of s 3 of the CJA when it qualifies the word 'decision' as opposed to 'ruling' of the court.

[11] The decision is a clear authority to support the proposition that s 67(1) read with ss 3 and 68(1) of the CJA precluded a litigant's right of appeal against a High Court decision in an amendment application made in the course of trial that does not finally dispose of the rights of parties. Otherwise, it would allow parties in civil matters to circumvent the restrictions imposed by the definition of 'decision' in s 3 of the CJA and thereby appeal against every decision of trial court, which would indisputably delay the administration of justice. The intention of the Legislature is clear on the matter. It is to limit and filter the number of appeals to the Court of Appeal. What it means in practice is that it is intended to filter appeals so as to prevent the appellate courts from being inundated with appeals and to prevent delays to the administration of justice. The legislative provisions are likewise clear in precluding from appeals decisions made in the course of trial and which do not finally dispose of the rights of parties. It has to be noted here that an aggrieved party would not be prejudiced by the filtering effect of s 3 of the CJA as it would still be open to the aggrieved party to raise the offending ruling in the appeal proper at the conclusion of the entire trial (see *Karpal Singh a/l Ram Singh v Public Prosecutor* [2012] 5 MLJ 293).

[12] There is another point worth noting. There have been a series of appellate court decisions that have read the definition of 'decision' in s 3 of the CJA as prescribing a restriction on the right of appeal in civil matters (see *Wong Kie Chie & Ors v Kathryn Ma Wai Fong (as the personal representative, executrix and trustee of the estate of the late Wong Kie Nai) & Anor and other appeals* [2017] 3 MLJ 350; [2017] 5 CLJ 707, *Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party)* [2016] 4 MLJ 100, *Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor* [2015] 1 MLJ 847 and

Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495).

[13] The present position in the law holds that an appeal does not lie against a decision in an amendment application made in the course of a trial and, further, such a decision does not finally dispose of the rights of the parties. In my opinion, the judgment in *Kempadang*, which is the decision of this court represents the law on the subject matter as we apply today. It is important to note that *Kempadang* concerns the interpretation of a statutory provision. Any decision of the Federal Court must be treated with utmost deference. More significantly, in my opinion, it is not a good policy for us at the highest court of the land to leave the law in a state of uncertainty by departing from our recent decisions. That will put us in a bad light as the Federal Court will then purports to be in a state of quandary when deciding a case. It is also a bad policy for us to keep the law in such a state of uncertainty particularly upon a question of interpretation of a statutory provision that comes up regularly for consideration before the courts. In *Co-Operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313, Gopal Sri Ram JCA in delivering the judgment of the Federal Court explained why it must sparingly depart from its own decision:

> First, I do not think, as a matter of policy, it is open to us to reverse a decision of another division of this court given so recently. Great care must be taken especially in a case as the present, which concerns the interpretation of a statutory provision. It should not be done save in the most exceptional of cases. Otherwise it would lead to uncertainty. Men of business must be in a position to organise their affairs in such a fashion that they keep well within the framework of the law. And members of the legal profession must be able to advise their clients with some degree of certainty as to what the law is upon a particular subject matter. Certainty in the law is therefore one of the pillars upon which our justice system rests.

[14] The same advice was echoed in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259:

> Members of the public must be allowed to arrange their affairs so that they keep well within the framework of the law. They can hardly do this if the judiciary keeps changing its stance upon the same issue between brief intervals.

[15] As one would expect, even though judges should not follow previous decision blindly as stated in *Chiu Wing Wa & Ors v Ong Beng Cheng* [1994] 1 MLJ 89 because some facts of the previous case might not apply to the present case despite the same term used, a situation where Federal Court decisions change like a swinging pendulum is nevertheless best avoided to ensure finality and certainty of the law. Definiteness and certainty of the legal position are essential conditions for the growth of the rule of law (see *The Bengal Immunity Company Limited v The State of Bihar* [1955] 2 SCR 603).

[16] Now, I am not saying that the Federal Court should never depart from an earlier decision. I recognise that while continuity and consistency are conducive to the smooth evolution of the rule of law, hesitancy to set right deviations will retard its growth. Although certainty is important, justice would be the paramount consideration when deciding a case. If judges found that there was error in law resulting to injustice, it is the duty of the Federal Court judges to correct and ensure justice by departing from the previous decided cases. Bhagwati J, in *Distributors (Baroda) Pvt Ltd v Union of India and Ors* AIR [1985] DC 1585 observed:

> ... It is essential that there should be continuity and consistency in judicial decisions and law should be certain and definite. It is almost as important that the law should be settled permanently as that it should be correctly. But there may be circumstances where public interest demands that the previous decision be reviewed and reconsidered. The doctrine of stare decisis should not deter the Court from overruling an earlier decision, if it is satisfied that such decision manifestly wrong or proceeds upon a mistaken assumption in regard to existence or continuance of a statutory provision or is contrary.
>
> To another decision of the Court. 'It was Jackson, J who said in his dissenting opinion in *Massachusetts v United States* (1947) 333 US 611:1 see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday'. Lord Denning also said to the same effect when he observed in *Ostime v Australian Mutual Provident Society* (1960) AC 459: 'The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff'.

[17] Indeed, the doctrine of stare decisis dictates that as a matter of a general rule of great importance the Federal Court is bound by its own previous decisions. However, there are exceptional circumstances that allow them to depart from the earlier decision, but such power must be used sparingly (see *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789, *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 and *Merck Sharp & Dohme Corp & Anor v Hovid Bhd* [2019] 12 MLJ 66; [2019] 9 CLJ 1). It would be prudent to exercise such power when a former decision, which is sought to be overruled, is wrong, uncertain, unjust, outmoded or obsolete in the modern conditions.

[18] To return to the present case, the most important reason why I would not depart from *Kempadang* is that I entirely agree with the statutory interpretation given by Justice Zainun Ali in *Kempadang* on s 67(1) of the CJA. My learned brother Justice Idrus Harun has undertaken a commendable in-depth and careful analysis of the interpretation of that section to show the correctness of *Kempadang*. I would not repeat it here. All I need to say is that, with respect, the decision is correct and should be followed. There is no valid reason to depart from this court's decision in *Kempadang*. I reject the argument

to the effect that the decision in *Kempadang* was made per incuriam or wrongly decided and ought no longer to be applied.

[19] For the foregoing reasons, the decision made by the High Court in the amendment application was not appealable. As the decision of the High Court in the amendment application was not appealable, the Court of Appeal had no jurisdiction to hear and determine the appeal. It committed a jurisdictional error when it heard the appeal. The respondent's appeal against the decision of the High Court was therefore incompetent and not properly brought before the Court of Appeal. The appeal is allowed with costs to be paid by the respondents to the appellant and the order of the Court of Appeal is set aside. Accordingly, the matter is remitted to the High Court for the commencement of the assessment proceedings. The appellant would of course be required to prove its claim for the damages as stated in the amended pleadings. The respondents would have the full opportunity to present their case in answer to damages claimed by way of the amendments allowed by the High Court.

David Wong FCJ (delivering dissenting judgment of the court):

INTRODUCTION

[20] At the hearing of this appeal on 15 July 2019, the learned chairman of the panel, the Chief Judge of Malaya, intimated to respective counsel that there may be an issue which needed to be addressed first and that is whether the matter before us is, in the first place, appealable.

[21] The matter before us is essentially an order of the High Court allowing the appellant to re-amend its pleadings which was subsequently reversed by the Court of Appeal on appeal. From the aforementioned exchange between the learned Chief Judge of Malaya and respective counsel, directions were then given for written submissions to be filed before the next hearing date fixed on 27 August 2019.

[22] On 27 August 2019, oral submissions on the appealability issue were made by respective counsel. Essentially the appellant, instead of proceeding with the main appeal, is now asking that we reverse the order of the Court of Appeal setting aside the High Court's order allowing in part the said amendment application on the grounds that the Court of Appeal's reversal was a nullity. This is premised on the grounds that the order allowing the amendment was not appealable by virtue of s 3 of the Courts of Judicature Act 1964 ('the CJA') and accordingly, the Court of Appeal had no jurisdiction to entertain it.

[23] Therefore, the issue before us is whether the High Court's decision

allowing the appellant's amendment application may be appealed to the Court of Appeal. This in turn rests on the question whether s 3 of the CJA as amended in 1997, is relevant in construing ss 67–68 of the CJA in terms of what is or is not appealable.

[24] My learned brother, ldrus Harun FCJ produced a draft judgment with which my learned brothers Azahar Mohamed CJ (Malaya), and Zawawi Salleh FCJ, agree with. However, with respect, I find myself unable to agree with the judgment which has now become the majority judgment. In my respectful view, a proper and wholesome interpretation of s 3 of the CJA against ss 67–68 of the same discloses that s 3 does not apply to civil appeals. I am therefore constrained to deliver this dissenting judgment to indicate in full the reasons for my view.

APPELLANT'S POSITION

[25] The submission of learned counsel for the appellant is simple and straightforward. It is this. The jurisdiction of the courts in civil appeals to the Court of Appeal is prescribed by s 67(1) of the CJA which provision cloaks the Court of Appeal with jurisdiction to hear and determine appeals from *any judgment or order* of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction.

[26] Itwas then submitted by learned counsel that the phrase 'any judgment or order' in s 67(1) of the CJA has a meaning circumscribed by the word 'decision' in s 3 of the CJA which provides that it means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[27] As it is common ground between counsel that the High Court's order allowing the appellant's amendment was a ruling made 'in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties', learned counsel submits that the aforesaid order of the High Court is not an appealable order and hence the Court of Appeal's decision in allowing the appeal was made devoid of jurisdiction.

[28] The aforesaid contention is the same as the one that adopted in *Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor* [2015] 1 MLJ 847; [2014] 1 LNS 1073:

> [11] Now, s 67 of the CJA provides that civil appeals may be lodged against a 'judgment' or 'order' of the High Court. The terms 'judgment' or 'order' are not defined in the CJA but they are collectively referred to as 'decision' as can be seen in s 3 of the CJA which states:
>
> 'Decision' means judgment, sentence or order, but does not include any ruling

made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[12] More significant still is that s 3 of the CJA qualifies a 'decision' so that it 'does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of parties'. That is why, in our judgment the decision of the learned High Court judge that Joseph Sipalan need not disclose 'his sources' was in fact a ruling made in the course of a trial, which did not finally dispose of the rights of the plaintiff. By reason thereof, it is not an order or a judgment as stated in s 67(1) of the CJA.

[13] The question of a right to appeal against a ruling made in the course of a trial was considered by the Court of Appeal in the case of *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495. In that case, the appellant appealed against the decision of the High Court, who had dismissed the appellant's appeal against the ruling of the registrar on an issue in regard to the admissibility of certain documents in the course of a hearings for assessment of damages. On appeal before the High Court and the Court of Appeal, both the parties argued on a preliminary issue namely, whether the appeal from the ruling by the registrar in regard to the admissibility of the documents was competent, and properly brought before the High Court in view of the definition of the word 'decision' in s 3 of the CJA. The Court of Appeal in the said case held that such a ruling was incapable of appeal. PS Gill JCA in delivering the judgment of the court said:

> Counsel for the respondent and appellant took us on a lengthy discourse of the nuances between a 'decision' which is a final order and a 'decision' as an interlocutory order, each holding their respective differing views, on whether the admissibility of the said documents was a final, and interlocutory order.
>
> On hindsight, we feel that this entire exercise on the interpretation of the meaning of a final order, and an interlocutory order was needless, and the case law that was tendered irrelevant. This is simply because one needs to merely look at the cold print of s 3 of the CJA as amended, to see that any ruling made in the course of a trial or hearing of any cause and matter, which does not finally dispose the rights of the parties, does not constitute a decision for the purpose of s 3 of the CJA, as amended. This is the stark reality of s 3 of the CJA, as amended. It is simply, and lucidly stated leaving no room for doubt in its application. The intention of the Legislature when drafting the amendment was that the amendment should serve as a filter process for appeals.
>
> What we feel, however, must be emphasised with equal force when scrutinising s 3 of the CJA, as amended, is that, the said ruling must be made in the course of a trial or hearing. Much emphasis, we feel, is placed on the latter part of the sentence vis a vis '... does not finally dispose of the rights of the parties', thus overlooking the fact that the ruling must be made in the course of a trial or hearing of any cause or matter. Counsel, we found, appeared to be preoccupied with the determination of whether the ruling disposes the rights of the parties, but paid scant regard to the fact as to at what juncture the said ruling was made.
>
> Equal weight should be attached to the entire sentence of s 3 of the CJA, as amended, for what must be asked is not only whether a ruling does not dispose the final rights of the parties but also the question whether it was a ruling made

in the course of a trial or hearing of any cause or matter. If it was not a ruling made in the course of a trial or matter, regardless of the fact that it did not dispose of the rights of the parties, it may not be excluded by the definition 'decision' as provided in s 3 of the CJA, as amended, and is therefore appealable.

To answer to the question posed earlier on, the ruling by the learned deputy registrar on the admissibility of the documents, made in the course of a hearing, was with equanimity, we say, a ruling on an issue other than the ultimate question, and is thus excluded by the exclusion clause in the definition of 'decision' in s 3 of the CJA, as amended.

[29] The Court of Appeal took a similar approach in *Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party)* [2016] 4 MLJ 100 ('Christopher ak Bandi') where it explained its reasoning as follows:

[15] In our considered view, there is no doubt that a decision on an application to amend the writ of summons and statement of claim, as it is here, is a decision made during the course of the trial which does not finally dispose of the rights of the parties, and therefore is not a decision within the meaning of s 3 of the CJA. The two ingredients of s 3 of the CJA had been complied with and hence we find that the factual matrix here is on all fours with *Datuk Seri Tiong King Sing* case.

[16] In our deliberation, we also find the recent decision of the *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301 to be of some significance and valuable guidance. In that case, it also concerned an application to amend pleadings and the principle of the often quoted case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 was discussed. The defendant there had applied for an amendment of his defence which was dismissed by the High Court judge. However, on appeal to this court, the application for amendment was allowed. On appeal to the Federal Court, the decision of the High Court judge in dismissing the application to amend the defence was reinstated. To recapitulate, the principle of *Yamaha Motor*'s case, in brief is simply this and that is as long as the amendment of the pleadings is bona fide and does not prejudice the opposing party, the application ought to be granted as the opposing party can be compensated with costs.

[17] The importance and great significance of the *Hong Leong Finance* case, is the jurisprudence which the Federal Court expounded in allowing the appeal. They recognise the fact that we have, of late, a new framework for civil procedure and we can do no better than quote what the learned Chief Judge of Malaya said:

[18] It is pertinent to note that Yamaha Motor was decided under the old RHC 1980. The civil procedure has since then changed with the introduction of the pre-trial case management in the year 2000 under O 34 of the RHC 1980 (wef 22 September 2000) and now under O 34 of the ROC 2012 (wef 1 August 2012). Nowadays the court recognises especially under the new case management regime that a different approach needs to be taken to prevent delay in the progress of a case to trial and for its completion. The progress of the case is no longer left in the hands of the litigants but with the court in the driver's seat (see the case of *Syed Omar bin Syed Mohamed v Perbadanan Nasional Bhd* [2013] 1 MLJ 461). In particular, when an application to amend the pleading is made

at a very late stage as was done in the present case, the principles in *Yamaha Motor* ought not to be the sole consideration. This is because an order for compensation by payment of costs in such a case may not be an adequate remedy and it would also disrupt the administration of justice which affects the courts, the parties and the other users of the judicial process (see the case of *Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd* [2014] 1 MLJ 80).

[18] The learned Chief Judge of Malaya had also relied on the view of the High Court of Australia (apex court of Australia) on how civil procedure of the Courts should be now. Heydon J in *AON Risk Services Australia Ltd v. Australian National University* [2009] 258 ALR 14 had this to say:

[111] An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend.

[112] A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to litigate

[113] In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principles and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.

[30] Learned counsel also referred us to the judgment of this court in *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd* [2019] 4 MLJ 614; [2019] 4 CLJ 131 ('Kempadang') where Zainun Ali FCJ held as follows:

[26] Civil matters which are not appealable to the Court of Appeal are listed in sub-s 68(1). For instance, there can be no appeal against a judgment or order made by consent of parties or a judgment or order which has been declared final by a statute. Another restriction to appeal can be discerned from the provision of s 3 of the CJA when it qualifies the word 'decision' as opposed to a 'ruling' of the court ...

The position on the amended s 3 of the CJA has been clearly set out in the decision of the Federal Court in the case of *Dato' Seri Anwar Ibrahim v Public Prosecutor* [2010] 6 MLJ 585 (see also *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v Public Prosecutor* [2014] 6 MLJ 831).

[39] In the case of *Dato' Seri Anwar Ibrahim* at p 595 (MLJ); p 636 (CLJ) the court pointed out the underlying reasons for the amendment to the definition of 'decision' in s 3 of the CJA which came into effect on 31 July 1998 in the following manner:

The underlying reason behind the amendment to the definition of 'decision' in s 3 of the CJA is to stop parties from stalling a trial before the trial court by filing appeal after appeal on rulings made by the trial court in the course of a trial. Apart from that, the definition of 'decision' by itself is sufficiently clear and it is the court's duty to give effect to the same. Justice demands that cases should move without unnecessary interruption to their final conclusion. That is what the amendment seeks to achieve as evident from the explanatory statement to the Bill which reads:

> 2. Clause 2 seeks to amend section 3 of Act 91.
>
> At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This cause a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts.

Quite apart from the explanatory statement to the Bill the definition of 'decision' by itself, to our mind, is sufficiently clear, and it is the duty of the court to give effect to the same. Justice demands that cases should move without unnecessary interruption to their final conclusion. That is what the amendment seeks to achieve. The right of a party who is aggrieved by a ruling, after all, is not being compromised, as the party can always raise the issue during the appeal, if any, to be filed after the trial process is brought to its conclusion.

[40] At this juncture, it is noted that the decision of the Court of Appeal in *Tycoon Realty Sdn Bhd* which was relied on by *Perkayuan* failed to give regard to the purposive and literal construction of sub-s 67(1) and s 3 of the CJA.

MY DECISION

[31] At this juncture, it would not be inappropriate to restate the general principles of law applicable to the construction of a provision of a statute. The court's primary duty is to expound the language of the words used in the statute under consideration in accordance with settled rules of construction and not necessarily with the policy of the statute.

[32] To ascertain the meaning of a given clause or section, the court must look at the whole statute. The Act must be read as a whole and all sections must be read bearing in the mind the provisions of other sections. Every clause of a statute should be construed with regard to the context and the other clauses of the Act so as to ensure that there is a consistent enactment throughout the Statute.

[33] In the process of discovering the true intention of the Legislature, the court is also duty-bound to adopt an approach promoting the purpose or

object underlying that particular statute. It is a well-established principle that the purposive approach to the interpretation of legislation only applies where doubt arises from the terms or words employed by the legislation. Where the words used are precise and unambiguous, then the literal and strict construction or plain meaning rule will apply.

[34] With the aforesaid principles at the foremost of my mind, I will now determine whether the submission of the appellant is tenable.

[35] The CJA is the primary legislation prescribing the functions of the judiciary in terms of the jurisdiction of the various courts in this country. It is also a superior legislation in that s 4 thereof provides that the CJA supersedes all other legislation save and except the Federal Constitution.

[36] The CJA consists of the following four parts:

PART 1 — PRELIMINARY AND GENERAL

PART 2 — HIGH COURT

PART 3 — COURT OF APPEAL

PART 4 — FEDERAL COURT

[37] Relevant to this appeal is Part III which comprises the following four areas:

General

Original jurisdiction

Appellate Jurisdiction — Criminal Appeal

Appellate Jurisdiction — Civil Appeals

[38] The jurisdiction of the Court of Appeal in respect of civil appeals is contained in ss 67–68 of the CJA which read as follows:

> Appellate Jurisdiction — Civil Appeals
>
> 67 Jurisdiction to hear and determine civil appeals
>
> (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from

any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

...

68 Non-appealable matters

(1) No appeal shall be brought to the Court of Appeal in any of the following cases:

(a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit*, except with the leave of the Court of Appeal;

(b) where the judgment or order is made by consent of parties;

(c) where the judgment or order relates to costs only which by law are left to the discretion of the Court, except with the leave of the Court of Appeal,· and

(d) where, by any written law for the time being in force, the judgment or order of the High Court, is expressly declared to be final.

(2) (Deleted by Act A886).

(3) No appeal shall lie from a decision of a Judge in Chambers in a summary way on an interpleader summons, where the facts are not in dispute, except by leave of the Court of Appeal, but an appeal shall lie from a judgment given in Court on the trial of an interpleader issue.

[39] As regards the Court of Appeal's appellate criminal jurisdiction, it is enshrined in s 50 of the CJA which reads as follows:

Appellate Jurisdiction-Criminal Appeals

50 Jurisdiction to hear and determine criminal appeals

(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court —

(a) in the exercise of its original jurisdiction; and

(b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

[40] The intention of the Legislature in the whole scheme of things is quite clear in that what is or is not appealable is expressly provided for in the aforementioned provisions. In the context of this appeal, s 68 is the relevant provision.

[41] The issue which confronts us now is whether the definition of the word

'decision' in s 3 as amended in 1997 of the CJA further limits the jurisdiction of the Court of Appeal in civil appeals.

[42] For clarity, I reproduce the relevant portion of s 3 of the CJA, as follows:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties; ...

[43] To recapitulate, it is the submission of the appellant that ss 67–68 of the CJA is subject to the s 3 definition of the word 'decision' premised on the grounds that the words 'judgment' or 'order' as appearing in s 67 of the CJA should take colour as it were, from the meaning assigned to the word 'decision', in the Act, as amended, as was done in the decision in *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495.

[44] With respect, I am unable to agree with that contention for the following reasons.

Section 3 of the CJA does not apply to s 67(1) of the CJA

[45] The amendment to s 3 of the CJA was made in 1997 during the trial of Anwar Ibrahim where a wealth of appeals was made against the various decisions made in the course of the trial. This can be gleaned from the Explanatory Statement of the Bill which sought to amend s 3 of the CJA that reads:

> At the moment, in the course of hearing a case, *if the Court decides on the admissibility of any evidence or document*, the dissatisfied party may file an appeal. If such appeal is filed, the Court has to stop the trial pending the decision of the appeal by the Superior Court. This causes a long delay in the completion of the hearing, especially when an appeal is filed against every ruling made by the trial Court. The amendment is proposed in order to help expedite the hearing of cases in trial Courts."

[46] A literal interpretation of the explanatory statement reveals that the purpose of the amendment was to prohibit parties from appealing against any decision made on the admissibility of any evidence or document and this, as mentioned, was due to the large number of appeals in *Anwar Ibrahim*'s case that stalled the progress of the trial. It is pertinent to note that the *Anwar Ibrahim*'s case was a criminal case.

[47] I also examined s 68 of the CJA which expressly lists down matters not appealable to the Court of Appeal, namely:

A (a) when the amount or value of the subject matter of the claim exclusive interest is less than two hundred and fifty thousand ringgit, except with the leave of Court of Appeal;

(b) judgments or orders made by consent of parties;

B (c) where the judgment or order relates to costs which by law is left to the court's discretion, except with leave of the Court of Appeal;

(d) any written law for the time being in force, the judgment or order is expressly declared to be final; and

C (e) decisions of a judge in chambers in a summary way (not by trial) on an interpleader summons, where the facts are not in dispute, except with leave of the Court of Appeal.

D **[48]** Such a provision is absent in the sections relating to the appellate jurisdiction of the Court of Appeal on criminal appeals. With this in mind, it is my opinion that it is neither incorrect nor unreasonable to say that s 3 of the CJA is the limitation on the Court of Appeal's jurisdiction to determine criminal appeals and that that limitation does not apply to civil appeals. This is E because, matters that are non-appealable are expressly provided for under s 68 of the CJA. This is articulated in *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd)* [2002] 4 MLJ 113 at pp 118–119, para H where Gopal Sri Ram JCA (as he then was) commented that s 67(1) is a very wide provision and that there are limitations F imposed by s 68(2) of the CJA.

[49] A similar position can be seen across the causeway where the Singaporean Supreme Court of Judicature Act ('the SCJA') in its Fourth and Fifth Schedule provide an extensive list on what matters are appealable and G cases that are appealable only with leave. Section 34(1) of the SCJA provides:

> 34 Matters that are non-appealable or appealable only with leave
>
> (1) An appeal cannot be brought to the Court of Appeal in any case specified in paragraph 1 of the Fourth Schedule except where provided in that Schedule.
>
> H (2) An appeal may be brought to the Court of Appeal in any of the following cases only with the leave of the High Court or the Court of Appeal unless otherwise provided in the Fifth Schedule:
>
> (a) any case where the amount in dispute, or the value of the subject matter, I at the hearing before the High Court (excluding interest and costs) does not exceed $250,000 or such other amount as may be specified by an order made under subsection (3);
>
> (b) any case specified in paragraph 1 of the Fifth Schedule ...

[50] The existence of s 68 of the CJA and the absence of the word 'decision' therein together with the failure to delete the words 'judgment' and 'order' in s 3 and to substitute those words with 'decision' in my considered view speaks volumes in that s 3 of the CJA was never meant to operate to limit the civil appellate power of the Court of Appeal. The legislative intent of the Legislature so to speak never wavered despite the 1997 amendment. Hence, it is without a doubt that by omitting the word 'decision' in the relevant provisions, the Legislature intended for s 3 to apply only to criminal appeals under s 50 of the CJA, to the exclusion of s 67 of the CJA. This statutory construction, I believe, is in line with the legislative intent behind the provisions (see *Gula Perak Bhd v Datuk Lim Sue Beng & other appeals* [2018] MLJU 2107*).*

[51] Here I risk repetition for clarity. I am not inclined to take the interpretation afforded by the appellant because s 68 expressly sets out what matters are and are not appealable to the Court of Appeal in the context of civil cases. It is submitted to us that s 3 was amended to include the present definition of the word 'decision' to prevent the stalling of trials caused by the filing of frivolous appeals. But, it must not be missed that if such an interpretation were taken, we will therefore have two provisions limiting appeals in civil cases ie generally in s 3 of the CJA and another specifically in s 68 of the CJA. It must also be borne in mind that prior to the said amendment, there was no equivalent provision to s 68 vis a vis s 50 on criminal appeals. After the amendment, ss 3 and 50 consistently use the words 'decision' whereas ss 67–68 use the words 'judgment or order'. Further, s 68 remained intact and continued to restrict the application of s 3. For all intents and purposes, it is my view that s 68 is the more specific provision and trumps the application of s 3 on the restriction of (civil) appeals.

[52] In fact, s 3 of the CJA begins with the opening phrase '[i]n this Act, unless the context otherwise requires', and then proceeds to define certain terms employed in the CJA. 'Decision' defined in the said s 3 is said to *mean* 'judgment, sentence or order'. Crucially, none of those other tail phrases are defined in the CJA. The word 'decision' is employed in s 50 of the CJA relating to the Court of Appeal's criminal appellate jurisdiction but is curiously and strategically absent in ss 67–68 of the same which instead use the phrase 'judgment or order'. Thus, taking what we said earlier, the argument that 'decision' as defined in s 3 of the CJA applies to ss 67–68 is not technically supported on the basis that 'judgment or order' in ss 67–68 do not mean 'decision' as defined in s 3 of the CJA.

[53] Now, in this vein, I find it necessary to refer to at least one case which has interpreted the application of the definition of 'decision' similar to mine. I am here referring to the case of *Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd* [1999] 2 MLJ 696; [1999] 3 CLJ 377 ('Tycoon Realty'). In this case,

A there was an appeal before the Court of Appeal against the High Court's decision to strike out the defendant's application to set aside an interim injunction granted by the High Court. The plaintiff, relying on *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321 argued that since the application gave no final decision on the matters in dispute, it was not
B appealable pursuant to s 3 of the CJA.

[54] The Court of Appeal in *Tycoon Realty* disagreed with the plaintiff's argument and held that such submission is misplaced for the fact that *Anwar*'s
C case was a criminal appeal under s 50 of the CJA whereas the case before it was a civil appeal under s 67(1) of the CJA.

[55] The Court of Appeal in *Tycoon Realty* further held that in the absence of the word 'decision' in s 67, the court must not on its own initiative import
D words into the provision as doing so would encroach into the purview of the Legislature. This can be found at p 701, para G-1:

> *It is to be noted that the word 'decision' is not used ins 67(1), so that, there is no compelling reason to refer to s 3 of the Act for its meaning as is in the case of criminal appeals.* That being so, the Court of Appeal has jurisdiction to hear appeals 'from
E any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction'. The phrase 'from any judgment or order' is not to be restricted to the meaning given to the word 'decision' in the current version of s 3. This is because, in s 67, civil appeal to the Court of Appeal are from 'any judgment or order' of any High Court, whereas, in the case of
F criminal appeals they are against 'any decision' made by the High Court. There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties. *It is not the business of a Court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the Legislature.* (Emphasis added.)

G

[56] The same sentiment was echoed in *Raja Kumar Andy & Ors v Namgayee Alagan & Anor* [2009] 5 CLJ 189 where the court observed that the word 'decision' is not found in s 67 of the Act though defined in s 3 and specifically employed in s 50 of the CJA. In interpreting the observation made, the court
H said the following (with which I concur):

> Perusing the above varied meanings of the phrase 'judgment or order', it is small wonder that Parliament has seen it fit not to supply an exact definition of the two words. In as much as Courts prefer certainty of interpretation, s 67 has empowered it to interpret and figure out whether a particular judicial decision will fall within
I the ambit of the phrase from the surrounding circumstances. Needless to say the interpretation must fall within the spirit of s 67 and the framework of the Act.
>
> In the circumstances of the case, as the words in s 67 were precise and unambiguous, we gave effect to the ordinary or technical meaning of the words in the context of the Act. We were satisfied that these words were not just mere popular words used in

normal parlance but technical words, and must mean more than a concluded opinion but carrying a judicial decision which has legal effect ...

In arriving at the above view, due to the delineation of jurisdiction, hence sidelining section 50 in the course of our deliberation, the need to allude to the terminology of 'decision' legislated in section 3 also did not arise as section 67 is devoid of it. (Emphasis added.)

[57] There are subsequent cases that followed the interpretation in *Tycoon Realty* that the court is not empowered to read the word 'decision' into s 67 of the CJA when Parliament intentionally omitted it during the amendment made to s 3 of the CJA. See the following cases:

(i) *See Teow Chuan & Anor v Dato' Anthony See Teow Guan* [2006] 3 MLJ 97;

(ii) *Indrani a/p Rajaratnam & Ors v Fairview Schools Bhd* [2001] 4 MLJ 56;

(iii) *Shorga Sdn Bhd v Amanah Raya Bhd (as administrator of the estate of Raja Nong Chik bin Raja Ishak, deceased)* [2004] 1 MLJ 143;

(iv) *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd)* [2002] 4 MLJ 113; and

(v) *Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd* [2000] MLJU 537).

[58] I am inclined to accord ss 3 and 67 of the CJA a purposive construction. Gopal Sri Ram JCA (as the then was) in *Silver Concept Sdn Bhd* at pp 118–119, para 1-A made the following statement of the construction of s 67(1) of the CJA:

My learned brothers and I are of the view that the words *'any judgment or order of any High Court in s 67(1) should be read liberally. That is the way in which they were read by this court in Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd* [1999] 2 MLJ 696. If we accept Mr Narayanan's argument, it would cut down the full effect of the section. It will limit the clear words of the section. We should not do that. (Emphasis added.)

Problems in interpretation

[59] I am also of the view that my interpretation of s 3 of the CJA vis a vis ss 50 and 67–68 of the same, and, in light of what was said in *Tycoon Realty*, is one which would serve as a panacea to the problems in the interpretation of s 3 of the CJA on the appealability of matters in civil cases and will further serve to avoid conflicting views on interpretation.

[60] There have been many attempts by the courts in interpreting the words 'does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of parties' when s 3 is held to also cover civil appeals under s 67 of the CJA (see *Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor* [2015] 1 MLJ 847, *Pentadbir Tanah Kuala Selangor lwn Maybank Islamic Berhad (Menteri Besar Selangor, intervener) dan lain-lain* [2015] MLJU 2177; [2015] 9 CLJ 197, *Anthony @ Alexander Ak Banyan v Bodco Engineering & Construction Sdn Bhd & Anor* [2011] MLJU 833; [2011] 1 LNS 1282, *Syarikat Tingan Lumber*). This seems to be problematic as various interpretations have been given by various judges (see Tan Kee Heng, in *Civil and Criminal Appeal in Malaysia* (3rd Ed) at p 108).

[61] The court in *Datuk Seri Tiong* made the following interpretation at para 11:

> Now, s 67 of the CJA provides that civil appeals may be lodged against a 'judgment' or 'order' of the High Court. The terms 'judgment' or 'order' are not defined in the CJA but they are collectively referred to as 'decision' as can be seen in s 3 of the CJA ...

[62] In *Datuk Seri Tiong*, it was held that what is of greater significance is at what juncture the said ruling was made in order to determine whether or not it is made in the course of a trial. I disagree with this proposition in respect of civil matters. It is important to note that the principle in *Tycoon Realty* was not considered in that case.

[63] The court in *Pentadbir Tanah Kuala Selangor* introduced the characteristics of a final judgment and the characteristics being:

(a) intended by the trial court as judgment irrevocably and final in deciding every matters in dispute between the parties;

(b) adjudicate all claims against all parties; and

(c) recorded by the court through an order.

I cannot agree with these characteristics because applying them would substantially restrict the right to appeal only to when the case (not the right) has been disposed of. This can be seen from the Court of Appeal's statement at p 213, paras D–F:

> ... keputusan akhir ialah satu keputusan yang melupuskan keseluruhan kes ('an entire case must be resolved') ...

[64] In *Alexander Banyan*, the court held that the rights of the parties would be finally disposed of only if a decision is made at the end of the trial. *Alexander Banyan* applied the test expounded in *Syarikat Tingan Lumber* in determining

whether a decision or order is final. The test is 'the order must therefore be a final order in the sense that it is final in the effect as in the case of a judgment or a sentence'. Again, with much respect, I cannot agree with this principle as this would go against the very essence of s 3 of the CJA, which is the final disposal of the rights of the parties albeit being made during the course of a trial. I pause to stress on the 'disposal of the rights of the parties', and that it is markedly different to 'disposal of the case'. However, I maintain my opinion that s 3 of the CJA does not apply to civil appeals for the reasons already adumbrated above.

[65] The Court of Appeal in the case of *Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party)* [2016] 4 MLJ 100 held that a decision on an application to amend the writ of summons and statement of claim was one made during the course of trial which did not finally dispose of the rights of the parties hence not a decision within the meaning of s 3 of the CJA. I cannot agree with this statement for the reasons that we have mentioned earlier.

[66] It appears that the aforesaid decisions were made at a time where the speedy and efficacious disposal of cases was the mantra of our courts. It still very much is. But unfortunately, in attempting to make sense of s 3 in the context of civil appeals, our courts, with respect, missed the rationale in *Tycoon Realty* on the clear demarcation between ss 3 and 50 on the one side; and ss 67–68 on the other side. With respect, the exercise of applying and rationalising the definition of 'decision' in s 3 in civil appeals, was for all intents and purposes an attempt at fitting a square peg in a round hole.

[67] Premised on this context, I find it necessary to note that the civil cases and procedure differ vastly from their criminal counterpart. Typical of civil cases are interlocutory applications. Singapore found it necessary to make detailed amendments to their SCJA after a careful study determining what matters may and may not be appealable. Within the context of our written law, we still remain governed by s 68 of the CJA.

[68] In the grander scheme of things, it has been an endless struggle to determine what is meant by the phrase 'finally disposes of the rights of the parties' in s 3 of the CJA. If at all such a test is to be employed within our borders, then it would be up to the legislative branch or the Rules Committee to come up with detailed provisions carefully crafted to that effect. As far as the law stands at present in *Kempadang*, there will invariably be civil applications which may not necessarily finally dispose of the rights of parties but may still and ought to be appealable nonetheless.

[69] Strictly by way of analogy, an application to consolidate proceedings

under O 4 of the Rules of Court 2012 is one such example. The primary purpose behind the consolidation of proceedings is to potentially avoid inconsistent decisions litigated by two different courts over a set of overlapping facts. See *MCAT Gen Sdn Bhd v Celcom (Malaysia) Berhad* [2007] 8 MLJ 277; [2007] 10 CLJ 356 and *Baring Futures (singapore) Pte Ltd (in liquidation) v Deloitte & Touche (A Firm) & Anor* [1997] 3 SLR 312. It is questionable whether consolidation proceedings finally dispose the rights of parties but should the application be refused it would certainly cause injustice to parties should they be denied the opportunity to appeal against the refusal to grant such an order. Rationalising whether a decision on consolidation of proceedings is appealable or not on the basis whether it 'finally disposes of the rights of the parties' is, in the context of civil appeals, an overly tenuous exercise unsupported by clear legislation to that effect.

This court's decision in Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd [2019] 4 MLJ 614

[70] The facts of the *Kempadang* case were these. The High Court judge after a full trial gave judgment in favour of Kempadang and ordered that damages be assessed. The deputy registar awarded damages in the sum of RM303,627 to be paid by Perkayuan to Kempadang. Perkayuan filed an application to set aside the order of the registar on damages, which was then dismissed by the deputy registar. The High Court judge affirmed the deputy registar's decision. Perkayuan then appealed further to the Court of Appeal. The Court of Appeal allowed Perkayuan's appeal in part and set aside the orders granted by the trial judge. The Court of Appeal granted damages to Kempadang, to be assessed based on the acreage and land for logging, having regard to cl 6 of the 1988 agreement on expenses and profits only. Following minute 3 of the order of the Court of Appeal, the matter was remitted to the deputy registar of the High Court for assessment of damages. On 18 October 2015, the deputy registar dismissed Kempadang's claim for damages on the ground that damages had not been proven. Aggrieved, Kempadang appealed to the judge in chambers. On 26 January 2016, the judicial commissioner ('JC') allowed Kempadang's appeal and set aside the decision of the deputy registar on damages. As a result, the JC ordered that Kempadang's damages be assessed again before a different Deputy Registrar. Aggrieved, Perkayuan appealed to the Court of Appeal.

[71] At the Court of Appeal, Kempadang raised only one issue to oppose the appeal ie that the JC's order was not a final decision as defined by s 3 of the CJA and was therefore not appealable. However, the Court of Appeal disagreed with Kempadang's argument and held that the appeal was competent, thus allowing Perkayuan's appeal. The Court of Appeal therefore set aside the JC's order and awarded nominal damages to Kempadang.

[72] Kempadang was granted leave by the order of this court to appeal against the decision of the Court of Appeal on the following question: A

> Whether an order of a High Court remitting the case back [sic] to the Deputy Registrar for damages to be reassessed was a final order which was appealable?

B

[73] Through the judgment of Zainun Ali FCJ, this Court scrutinised the word 'ruling' under s 3 and found that the order made by the JC was not issued in the course of the hearing of the appeal. The order of the High Court dated 26 January 2016 showed that after hearing both parties, the JC had proceeded to dispose Kempadang's appeal and set aside the decision of the registar dated C 18 October 2015 on assessment of damages. The order of the JC, remitting the matter to the Registrar of the High Court for reassessment of damages, was not caught by the exclusion clause of the word 'decision' in s 3 of the CJA and was therefore appealable. In this regard, let me just say that it could be reasonably argued that the order of the JC was an order which had not finally disposed D with the rights of the parties and hence caught by the definition of s 3 of the CJA. This just serves to show, as I stated earlier, that it had caused problems in the interpretation of the same.

E

[74] To solve this problem, the simple solution, based on settled principles of statutory interpretation, is to disregard the application of s 3 of the CJA when interpreting ss 67–68 of the CJA. In other words, the word 'decision' as defined in s 3 of the CJA does not extend to nor qualify civil appeals which are governed specifically governed by ss 67–68 of the same. F

[75] Even though this Court in *Kempadang* had the benefit of submissions and arguments on the principle enunciated in *Tycoon Realty*, it nevertheless chose to read s 3 of the CJA into s 67(1) of the CJA on the ground that the court in that case did not apply a purposive and literal construction. G

[76] Now, the primary reason, from my reading of the *Kempadang* judgment why this court held the definition of 'decision' extends to ss 67–68 is on the basis that the s 3 of the CJA is a definition provision. This court also appeared H to note that the explanatory statement to the amendment introducing the word 'decision' did not appear to make a distinction between civil or criminal appeals. It is my respectful view that in arriving at this conclusion, the court may have inadvertently overlooked (or perhaps the case was not cited) its own prior decision just a few months before in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561. At paras I 149–150, the same judge, Zainun Ali FCJ held as follows:

> It is axiomatic that a right of appeal is statutory. What then is the effect of this? First, it simply means that when conferred by statute, the right of appeal becomes a vested right. Correspondingly the jurisdiction of the court to hear appeals is also conferred by statute ...
>
> A fortiori, the nature of the appeal depends on the terms of the statute conferring that right. *It is a matter of construction to be given to the provisions conferring the right to appeal. Legislative intention can also be found by examining the legislation as a whole. Limiting the right to bring an appeal is a way of encouraging finality. If an examination of the language and policy of the Act granting the right of appeal concludes that Parliament intends to limit an appeal, the court must give effect to it.* (Emphasis added.)

[77] With the utmost respect to the learned judge, the simple extension of the s 3 definition of the word 'decision' to ss 67–68 overlooks the crucial opening words apparent in s 3 itself namely: 'unless the context otherwise requires'. The essence of NH Chan JCA's view in *Tycoon Realty* as to why 'decision' as defined could not extend to ss 67–68 is best expressed in His Lordship's own words, as follows (quoted from para 23 of *Kempadang*):

> There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties. *It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the Legislature.* (Emphasis added.)

[78] In view of what I stated earlier, I am with respect, unable to agree with the interpretation and approach taken by the court in *Kempadang*. This is because, a purposive and liberal approach was in fact taken by the court in *Tycoon Realty* albeit without discussion on the correct approach to be taken. But one may glean it from the method of interpretation itself. Just because the court did not label the interpretation they adopted, it does not mean they did not take such interpretation. The court in *Silver Concept*, as discussed earlier, expressly stated that the court in *Tycoon* read s 67(1) liberally.

[79] I am of the view that the following statements made on s 67(1) in *Silver Concept* at p 119, paras B–D are of significance and importance:

> There is constitutional reinforcement for the view we take. Article 121(1B) of the Federal Constitution after creating the Court of Appeal confers jurisdiction 'to determine appeals from the decision of a High Court or a judge thereof but not from a decision of the registrar of the High Court. The article goes on to say in effect that federal law may confer other jurisdictions. *So, if we read s 67(1) together with art 121(18), we can see at once that no limitation may be placed upon the appellate jurisdiction of this court.*
>
> We now turn to the words of restriction appearing in s 67(1). They say that thejurisdiction is 'subject nevertheless to this or any other written law regulating the

terms and conditions upon which such appeals shall be brought.' The critical words are those to which we have lent emphasis. Now, what do those words mean? In our judgment, they mean that the Act or some other written law, such as the Rules of the Court of Appeal, may only regulate the way in which the appeals may be brought. For example the Act or other written law may stipulate that appeals in particular cases require leave; or that a deposit of a fixed sum must be paid as security for costs when the notice of appeal is filed. (Emphasis added.)

[80] Taking the point Zainun Ali FCJ made in *Semenyih Jaya*, legislative intent must be ascertained by examining the language of the statute as a whole. The qualification at the very beginning of s 3, and the specific limitation of rights to appeal in s 68 certainly does not spell out a clear legislative intent to restrict civil appeals beyond the restrictions already in place. Reading the CJA as a whole, I am not prepared to take the place of the Legislature and read restrictions beyond what s 68 already stipulates and what Parliament itself did not clearly express.

Final analysis

[81] Another *raison d'etre* s 3 of the CJA is not applicable to civil appeals under s 67(1) of the CJA is r 12 of the Rules of the Court of Appeal. In r 12, an appeal may be lodged to the Court of Appeal against an order in chambers granted by the High Court, against the High Court's refusal of an application and any judgment or order granted by the High Court (see *Tan Kee Heng* at pp 108–109).

[82] The appellant also impressed upon us the argument to uphold the application of s 3 of the CJA to civil appeals on the grounds that it has been the mantra of our courts to move towards the speedier disposal of cases. Given my exposition above, it is untenable to extend s 3 to ss 67–68 respectively of the CJA simply to favour the speedy disposal of cases. If our analysis of the law has revealed anything, such an extension has inevitably muddled up our law. In any event, speaking specifically in the context of amendment applications, this court has already set out detailed guidelines on how to deal with eleventh hour amendment applications in *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301.

CONCLUSION

[83] I remain fully aware of the divergence in the interpretations of s 67(1) and s 3 of the CJA as well as the effort of learned judges to define the various terms employed in s 3 of the CJA. It is my hope that the approach I take in the present appeal will clarify the position and not further muddy the water.

[84] The definition of s 3 of the word 'decision' is not applicable in s 67 of the CJA as succinctly pronounced by the Court of Appeal in *Tycoon Realty* and the subsequent cases that followed it. This court in *Kempadang* disagreed with the interpretation in *Tycoon Realty* as it purportedly failed to take into consideration the literal and purposive interpretation of the provisions. I disagree as by looking at the interpretation of the Court of Appeal in *Tycoon Realty*, it could be deduced that the purpose of the provisions and the intention of the Legislature had been taken into consideration by the Court of Appeal in that case.

[85] I am also patently aware that our opinion on this preliminary objection is of great significance to all civil appeals. For the removal of any doubt, it is my judgment that from herein out, s 3 of the CJA (in its present form) shall have no bearing on the appealability of civil appeals.

[86] In the context of this case, for the foregoing reasons, I would unanimously dismiss the preliminary objection and hereby decide that the High Court's decision to allow in part the appellant's amendment application is appealable. Thus, in my view, the decision of the Court of Appeal to reverse the substantive decision of the High Court should therefore proceed to be heard on the merits.

[87] Finally, I wish to acknowledge that I had in *Christopher ak Bandi* taken a view contrary to the views expressed here. I wish to note here that the argument put forth now by the respondent was not canvassed before me in that case. Now, with the benefit of hindsight and further reflection, I adopt the view that s 3 of the CJA does not affect ss 67–68 for reasons set out earlier in this judgment.

[88] For reasons stated above, I dismiss the preliminary objection and direct that the appeal proper do proceed and be heard on the merits. I make no order as to costs as the present issue was one raised by this court *suo motu.*

Idrus Harun FCJ (delivering majority judgment of the court):

[89] The brief background facts leading to the filing of this appeal are broadly undisputed. I draw them largely from the judgements of the courts below us as well as from the pleadings of the instant suit. By its particulars of claim dated 6 February 2014, Asia Pacific Higher Learning Sdn Bhd which owns and operate Lincoln University College, is the plaintiff to the action. They originally seek against Majlis Perubatan Malaysia and Prof Dato' Dr Wan Mohamed Bebakar, the first and second defendants to the action, general damages for the torts of negligence, breach of statutory duty and misfeasance in public office in carrying out its accreditation survey and evaluation of the

medical degree programmes offered by the plaintiff. In their claim, the plaintiff in substance alleges that the first defendant had cancelled the plaintiff's medical degree programmes on 10 October 2013 and asserts that such cancellation was wrongful. They also claim for special damages in the sum of RM450,000 being costs of preparation for the first accreditation visits and the sum of RM1m as costs of preparation for the second accreditation visit, interest, injunctive relief and an apology.

[90] The claim was amended twice on 5 May 2015 and 10 September 2015. The first amendment was to extend the causes of action to assessment visits conducted by the defendants. The second amendment was intended to include an allegation of bias against the first defendant as well as purported conflict of interest of the first defendant's council members.

[91] The plaintiff also simultaneously commenced Kuala Lumpur High Court Judicial Review Application No R2–25–13–02 of 2014 ('the JR application') against the first defendant herein. By these proceedings, the plaintiff seeks to be granted an order to quash the decision made on 10 October 2013 by the first defendant to cancel the medical degree programmes, a declaration that the cancellation was null and void and an order of mandamus to compel the first defendant to maintain the approvals given to Lincoln University College to conduct the medical degree programmes.

[92] Two years after the instant case was commenced, on 7 April 2016 to be exact, the plaintiff filed a fresh writ action in Kuala Lumpur High Court Civil Suit No WA-21NCVC-38–04 of 2016 ('Suit 38') against the first defendant herein, the Minister of Health and the Government of Malaysia. The plaintiff alleged, inter alia, that the defendants there were liable for the torts of breach of statutory duty and misfeasance in public office arising from the alleged wrongful action by the first defendant in cancelling the medical degree programmes on 10 October 2013 and for reduction in the student quota for another medical degree programmes from 100 students to 70 students. For these reasons, the plaintiff sought special damages in the sum of RM579,992,400. It is important to note that the plaintiff does not claim for this sum in both the instant action and the JR application.

[93] On 17 June 2016, the JR application was allowed by the High Court and accordingly the cancellation of the medical degree programmes was quashed. The first defendant appealed to the Court of Appeal against the said decision of the High Court. The appeal was dismissed on 30 October 2017. A motion for leave to appeal against the decision of the Court of Appeal was filed by the first defendant on 28 November 2017. The Federal Court dismissed the motion on 19 March 2018.

[94] Subsequently, on 25 July 2016, the first defendant herein, the Minister of Health and the Government of Malaysia filed their applications to strike out Suit 38. The High Court, on 21 February 2017, allowed the striking out application filed by the Minister of Health and the Government of Malaysia. However, in respect of the first defendant's application, the High Court only struck out the claim for special damages arising out of the cancellation of the medical degree programmes but did not strike out the part of the claim pertaining to the reduction of the student quota. The plaintiff, being dissatisfied with the decision of the High Court, filed an appeal to the Court of Appeal on 17 March 2017.

[95] It ought to be highlighted that following the above decision and some three years after this suite had been commenced, the plaintiff on 13 March 2017, moved an application to amend their claim in the instant action to add a claim for special damages in relation to the aforesaid cancellation in the sum of RM579,992,400 which was the original claim in Suit 38. The High Court allowed the application on 13 June 2017. Following the High Court's decision, the plaintiff withdrew the appeal dated 17 March 2017 and discontinued Suit 38. The defendants in the meanwhile appealed to the Court of Appeal against the decision of the High Court in allowing the amendment application. On 5 January 2018, the Court of Appeal allowed the appeal by the defendant. This appeal has been brought by the defendants against that decision with the leave of this court.

[96] To revert at this point to the trial of this suit, I should note that on 14 February 2018, the High Court allowed the plaintiff's claim on liability in respect of torts of negligence, breach of statutory duty and misfeasance in public office. This court was told that on 10 January 2019, the defendants had filed an appeal to the Court of Appeal against the High Court's decision dated 14 February 2018. In the meantime, the plaintiff's application for assessment of damages has been fixed for case management pending the outcome of the said appeal.

[97] I should also note that the amendment application was brought when the trial was already heard in midstream in which six witnesses out of eight had already testified at the relevant time.

[98] In the course of my deliberations, I shall thereafter in this appeal refer to the plaintiff and the defendants to the action as the appellant and the respondents respectively. But before making any allusion to the matter directly in issue at all, it is perhaps right to emphasise at this stage that this appeal is determined pursuant to s 78 of the Courts of Judicature Act 1964 ('the Act') due to the retirement of our learned sister Alizatul Khair FCJ.

[99] This appeal came on for hearing before this court on 15 July 2019. in the course of opening their case, learned counsel for the appellant informed the court that he would like to raise a preliminary issue. The question that learned counsel had raised by way of the preliminary issue basically involved only one albeit rather significant question. Stated shortly, it concerns the question of whether the order made by the High Court on 13 June 2017 in allowing the appellant's application to amend the re-amended statement of claim is appealable. The preliminary point in effect seeks to pull the rug out from under the feet of the respondent at the very beginning of the appeal proceedings before this court. Learned counsel for the appellants understandably immediately indicated that he was taken by surprise by this preliminary issue and sought this court's indulgence to allow an adjournment as he needed time to consider the issue. We accordingly adjourned the appeal to 27 August 2019 and intimated to the parties that they should deliver their written submissions on the issue in view of its importance.

[100] On the adjourned date, learned counsel, submitting on behalf of the appellant on the preliminary point, argues that the issue concerns the jurisdiction of the Court of Appeal and a question of jurisdiction could be raised at any time even if the parties acquiesce in the matter or waive their right to raise objection as to want of jurisdiction. This is because the High Court's decision constituted a ruling made in the course of a trial that did not finally dispose of the rights of the parties. He refers to sub-s 67(1) of the Act drawing our particular attention to the words 'judgment' or 'order' appearing therein and emphasises that the words are not defined in s 3 of the Act.

[101] Learned council's further contention pressed on behalf of the appellants is that from a plain reading of s 3 of the Act, a 'decision', 'judgment' or 'order' excludes a ruling made in the course of a trial or hearing that does not finally dispose of the rights of the parties. Such a 'decision', 'judgment' or 'order' learned counsel argues, is not appealable to the Court of Appeal when s 3 is read with sub-s 67(1) of the Act.

[102] Learned counsel next argues that the appellant's amendment application was made in the course of the trial. The application was filed prior to the conclusion of the trial and before the High Court delivered its judgment on liability. The appellant's amendment application by its very nature did not finally dispose of the rights of either party. The clearest indication of this, according to learned counsel, is that the suit is still pending hearing of the assessment of damages proceedings before the High Court.

[103] Accordingly, the present position in the law holds that an appeal does not lie against a decision in an amendment application made in the course of trial and, further, such a decision does not finally dispose of the rights of the

parties. In the result, the High Court's decision to allow the amendment application was not an appealable decision to the Court of Appeal in view of the definition of the word 'decision' in s 3 read with sub-s 67(1) of the Act. To drive home his point, learned counsel submits that the issue whether a decision is appealable is a jurisdictional matter. The Court of Appeal's order that reversed the High Court's ruling is a nullity as it is made in breach of s 3 of the Act and is thus in excess of jurisdiction. In this regard, the Court of Appeal did not have the jurisdiction to determine the appeal from the High Court's decision as the ruling in the appellant's amendment application was not appealable. The Court of Appeal's order should therefore be set aside.

[104] On behalf of the respondents, learned counsel begins his submission under this rubric by drawing our attention to the fact that the issue of whether the decision of the High Court in allowing the appellant's amendment application is appealable was never raised in the court below us and comes up for the first time before this court on the hearing of the full appeal. His submission also asserts the position that the decision of the High Court is appealable. This is because the High Court's decision in allowing the appellant's amendment application was given at the conclusion of the hearing of an interlocutory application on its merits. Accordingly, the respondents, being the aggrieved party, cannot be denied the right of appeal as it was not a ruling made in the course of hearing the interlocutory application but rather a decision made at the conclusion of the interlocutory application on its merits.

[105] I should start off with the first point taken on jurisdiction. The issue is whether the preliminary issue can be raised on an appeal before this court when this issue was not raised at all by the appellant before the Court of Appeal. For my part, I fully accept the propositions advanced by learned counsel for the appellant on the law concerning jurisdiction as broadly correct. In fact, it would not be an exaggeration for me to say that there is always unavoidable and strong inclination on the part of the courts to allow jurisdiction challenge at any stage of proceedings. In saying that I should emphasise as a matter of law, that the court is competent to entertain and try a suit if it were competently brought. However, where no jurisdiction exists or the court has no inherent jurisdiction, the suit is not competently brought and the court therefore has no power to take one more step. In other words, the court is not perfectly competent to entertain and try the suit. Jurisdiction it is often said, does not originate in consent or acquiescence of the parties and cannot be established, where it is absent, by such consent, acquiescence or waiver of rights. A consideration of the authorities such as *Datuk TP Murugasu v Wong Hung Nung* [1988] 1 MLJ 291; *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2018] 4 MLJ 496 (CA) and *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2019] MLJU 742 (FC), confirms the propositions which I have expressed.

[106] It is relevant to note that as a general rule, a judicial decision made in want of jurisdiction or in breach of statute would be considered a nullity that is amenable to review at any stage of the proceedings and that the court has inherent powers to set aside non-appealable orders exercisable on its own motion and even if parties did not raise objections as to want of jurisdiction or tacitly acquiesce in the matter or brought by the party which the order purports to affect for that purpose (*Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393). Accordingly, while the respondent is quite correct to regard the preliminary issue was raised at the eleventh hour, I see nothing in the respondents' protestation that the preliminary point was not raised in the intermediate appellate court below us to entitle this court to refuse to hear it. I reject their argument.

[107] I feel bound to say that, as it stands, it clearly appears that the preliminary point raised by the appellant is beyond the two questions of law for which leave to appeal to this court was granted. However, this court is not precluded from inquiring into issues which are not part of the leave questions as we are here legitimately concerned with the issue of jurisdiction and I thus feel obliged to say that it is desirable for this court to deal with any matter including the preliminary issue as raised by the appellant which we consider relevant for the purpose of doing complete justice according to the substantial merits of a particular case (*Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97).

[108] For clarity, I hasten to add at this point that it has been accepted by this court that a jurisdictional error would also arise or include a situation where a court pronounces upon a lower court decision that is not appealable. In *Chan Yock Cher v Chan Teong Peng* [2005] MLJU 673 the Federal Court in considering the circumstances under which the court would set aside its previous decisions on the ground of jurisdictional error had this to say:

> We do not say that the circumstances under which this court would set aside its previous decisions, judgments or orders and for the re-hearing of the appeals are closed. Neither do we intend to list down the circumstances that warrant such an order. However, to give two examples, there may be jurisdictional error, for example, *where the court inadvertently heard and decided on an appeal which, in law, is patently not appealable to this court*, or due to illegality where this court inadvertently imposed a sentence unknown in law or in excess of the maximum sentence permissible by law. (Emphasis added.)

[109] Having briefly outlined the law on the point of jurisdiction, and thereupon held that this court is not precluded from hearing this preliminary issue, I now deal with the main issue in contention. To set the context, I shall allude initially to the definition of the word 'decision' in s 3 of the Act. It now provides:

'decision' means judgment, sentence or orders, *but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties*; (Emphasis added.)

The above definition was provided in the Act by way of an amendment to s 3 thereof in 1998 vide Act A1031 by substituting for the earlier definition of 'decision' which was added to the Act in 1984 by Act A606. The highlighted part of the definition is the excluding or limiting clause which was added to the said definition pursuant to the amendment by Parliament in 1998.

[110] To my mind, whether a decision is a ruling that is excluded by the exclusionary clause in the definition of 'decision' in s 3 requires an interpretation of that clause. The actual words used in that clause have to be considered. In *Sitrac Corp Sdn Bhd v Lim Siew Eng* [2002] 3 MLJ 315, it was held that it is incorrect in interpreting the said clause to begin by asking the question of whether the decision is a final order or an interlocutory order because these terms were not used in the excluding clause. Stated simply, the excluding clause in the definition of the word 'decision', in my view, gives a clear impression that a decision does not include any ruling which comes within the category of one that is made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties. On the contrary, where a ruling which is made in a similar fashion, finally disposes of the rights of the parties, such ruling is decision within the meaning ascribed to it in the said interpretation section. It is also important to emphasise that the ruling must be made in the course of a trial or hearing (see *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd* [2019] 4 MLJ 614; *Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor* [2015] 1 MLJ 847; *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495).

[111] Broadly speaking, the point raised as described by learned counsel for the appellant appears to be simple. However, when this issue is approached in minor details with meticulous legal eye, I fully accept and understand the difficulties in which the court finds itself when it attempts to construe the word 'decision' as defined in s 3 of the Act. The point raised by the appellant admittedly is far from just being a simple point of interpretation especially when the definition is considered with ss 50 and 67–68 of the Act.

[112] Having listened to the rival oral submissions advanced by learned counsel for the respective parties and examined thoroughly their written submissions, it is perhaps right to emphasise two things. The first point is that, as a matter of general approach, when I strive to construe the definition of the word 'decision', read together with ss 50 and 67–68 of the Act, I can say with fair certainty that such approach begs the question of whether the said definition applies or extends to civil appeals. To put it in another way, can the

court disregard the application of the definition of the word 'decision' when interpreting ss 67–68 of the Act. The second point and in fact a corollary to the first point concerns the question of whether the decision of the High Court to allow the appellant's application to amend the reamended statement of claim is appealable.

[113] Essentially, the first question in substance and effect relates to the extent to which the word 'decision' applies. Learned counsel for the appellant adopts the position that the definition of the word 'decision' applies to both civil and criminal appeals. Nevertheless, a point of relevance likely to figure at this stage is whether the word 'decision' only applies to criminal appeals. This issue is not interestingly new as it had been raised previously in an appeal before this court. I shall allude to that case shortly.

[114] As it is clear to me, s 50 of the Act provides for the jurisdiction of the Court of Appeal to hear and determine criminal appeals against any decision made by the High Court in the exercise of its original jurisdiction and in the exercise of its appellate or revisionary jurisdiction in respect of any matter decided by a subordinate court. Section 67 of the Act, on the other hand, provides for the appellate jurisdiction of the Court of Appeal from decisions of the High Court to hear and determine civil appeals in any civil cause or matter. In my view, both ss 50 and 67 of the Act must be read together in considering whether the excluding clause in the definition of 'decision' in s 3 relating to the exclusion of appeals against non-final decisions applies to both civil and criminal appeals.

[115] Now, the more sensible curial approach I am going to adopt in this appeal as regards the first question has a great deal in common with the issue raised before this court in its latest pronouncement on the subject in *Kempadang*. Of particular importance, in the context of the issue raised at this preliminary stage, the uncertainty on whether the excluding clause in the definition of 'decision' in s 3 applies to civil appeals has been laid to rest in *Kempadang*. The position that was adopted by the respondent there was that firstly, the absence of the word 'decision' in sub-s 67(1) of the Act rendered s 3 inapplicable, secondly, the words 'judgment and order' in s 67 of the Act were specific words and ought not to be read within the context of 'decision' in s 3 of the Act, and thirdly, the meaning of the word 'decision' in s 3 only applied to criminal appeals. The basis of the respondent's argument in *Kempadang*, as it is clear to me is very simple. Section 50 of the Act which provides for jurisdiction of the Court of Appeal to hear and determine criminal appeals uses the word 'decision' whereas in sub-s 67(1) thereof the said word is absent, instead the words 'judgment or order' are used in providing for jurisdiction of the said court to hear and determine civil appeals. The Court of Appeal's decision in *Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd* [1999] 2 MLJ 696 was

relied on by the respondent to support the proposition they had advanced. NH Chan JCA there said:

> It is to be noted that the word 'decision' is not used in s 67(1), so that, there is no compelling reason to refer to s 3 of the Act for its meaning as is in the case of criminal appeals. That being so, the Court of Appeal has jurisdiction to hear appeals 'from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction'. The phrase 'from any judgment or order' is not to be restricted to the meaning given to the word 'decision' in the current version of s 3. This is because, in s 67, civil appeals to the Court of Appeal are from 'any judgment or order' of any High Court, whereas, in the case of criminal appeals they are against 'any decision' made by the High Court. There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the right of the parties. It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the Legislature.

[116] In addressing the question of whether the definition of the word 'decision' extends to civil appeals, the Federal Court in *Kempadang* held that it was clear and unambiguous that the definition of 'decision' was applicable to civil appeals inasmuch as it applied to criminal appeals. In arriving at the above conclusion, this court on this point succinctly described the following position:

> [31] In the absence of the word 'decision' in sub-s 67(1) of the CJA, the question is whether the phrase 'judgment or order' mentioned in sub-s 67(1) of the CJA is a 'decision' within the context of s 3 of the CJA. Putting it in another way, the question is whether the exception provided in s 3, which excludes a 'ruling' from the meaning of decision, should be extended to s 67(1), thus restricting any appeal to be filed against any ruling of the High Court?
>
> [32] It bears repeating that the words 'judgment' and 'order' are not defined in s 3 of the CJA. Nevertheless they appear in s 3, to form the meaning of 'decision'. The omission of the word 'decision' in sub-s 67(1) of the CJA is capable of being understood. Section 3 says that 'decision' means 'judgment, sentence or order ...'. It is seen that by the words 'judgment' and 'order', sub-s 67(1) indicates the form a 'decision' will take in s 3 of the CJA where the word 'sentence' is absent. This is appropriate since, a civil court does not impose a sentence in its decision. A sentence is a decision given by a judge sitting in a criminal court upon conviction of a criminal charge. Thus the words in sub-s 67(1) are clear and unambiguous and the court must give effect to its meaning.
>
> ...
>
> [44] In view of the above, we are unable to agree with the approach taken by learned counsel for Perkayuan, that the scope of a 'decision' in s 3 is excluded from sub-s 67(1) of the CJA. Subsection 67(1) of the CJA must be read together with s 3 of the CJA.

[117] Subsection 67(1) of the Act defines the jurisdiction of the Court of Appeal to hear and determine civil appeals as follows:

> 67 Jurisdiction to hear and determine civil appeals.
>
> (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from *any judgment or order of any High Court in any civil* cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought. (Emphasis added.)

I should emphasise that although the word 'decision' is not expressly used in sub-s 67(1) of the Act, the terms 'judgment' or 'order' appear in the definition of the word 'decision' in s 3 although they are not defined in the Act. Azahar Mohamed JCA (now CJM) in the Court of Appeal case of *Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor* [2015] 1 MLJ 847 in para [11] accepted that the terms 'judgment' or 'order' are collectively referred to as 'decision' as can be seen in s 3 of the Act. The force of the point taken by the learned judge in *Datuk Seri Tiong King Sing* can be seen in the judgment of the Federal Court in *Kempadang* when it sought to explain the interplay between these words in s 3 and sub-s 67(1) of the Act in para [32] which is reproduced above and accordingly held that the scope of a 'decision' in s 3 is not excluded from sub-s 67(1) and that sub-s 67(1) must be read together with s 3 of the Act.

[118] It should be noted that the way in which the terms 'judgment' or 'order' and the word 'decision' have an effect on each other was already considered by the same court much earlier in the case of *Syarikat Tingan Lumber Sdn Bhd* where in giving these words its widest significance, the said court adopted the time honoured guidelines of contextual interpretation or the doctrine of associated words in construing the said terms asserting that the same should take as it were their colour from their meaning assigned to the word 'decision' in the Act. This approach of construing a statute was also recognised by this court in *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 in para [14] when it adopted a well-known and legitimate rule of statutory interpretation 'to construe words in an Act of Parliament with reference to words found in immediate connection with them ... The exact colour and shape of the meaning of any word in a statute is not to be ascertained by reading them in isolation but in the context of the other enacting parts of the statute ... It has been held that words must be read structurally and in their context for their significance may vary with their contextual setting'.

[119] It is clear, in my view, that from a plain reading of s 3 of the Act, a 'decision', 'judgment' or 'order' excludes a ruling made in the course of a trial or hearing that does not finally dispose of the rights of the parties. I realise of

course that indeed, that is the position adopted by the appellant when their counsel submits that the definition of the word 'decision' covers and applies to civil appeals as well. On the contrary, from the general tenor of the respondents' submission on this question, it seems to be their case that the said High Court's decision made pursuant to O 20 r 5 of the Rules of Court 2012 is not included in the list of non-appealable matters in sub-s 68(1) of the Act and as such the decision is appealable.

[120] From the decision of this court in *Kempadang*, it is becoming increasingly apparent that reading s 3 in the definition of the word 'decision' harmoniously with s 67 of the Act, the provisions clearly limit the right of appeal in both criminal and civil appeals. I would accept entirely that decision as broadly stating the correct position of the law having construed the word 'decision' together with the provisions of ss 50 and 67–68 of the Act unless there is something in the Act that would convince me to come to some other conclusion. I am prepared to go further to say that I have been very careful perusing through the relevant provisions of the Act, and upon reading them all, the conclusion at which I am constrained to arrive is that I cannot glean a great deal that is very decisive from a perusal of these provisions that would persuade me to hold that the word 'decision' as defined in s 3 of the Act does not extend to civil appeals or ought to be disregarded in interpreting ss 67–68 of the Act.

[121] I should of course emphasise that it is incumbent on this court to also consider other relevant provisions which are directly related to or are found in immediate connection with the definition of the word 'decision' in ss 3, 50 and 67–68 of the Act. It is important to bear in mind that the function of the court when construing an Act of Parliament is to interpret the statute in order to ascertain its legislative intent. In doing so, the court should not disregard the statutory words used in the statute. I am also alive to the necessity to consider every word in each section of an Act of Parliament and give its widest significance. Needless to say, for the purpose of considering whether the limiting clause in the definition of 'decision' applies to civil appeals, the key words relevant to the question that would give a clear indication that the limiting clause equally applies to civil appeals must be considered. These relevant key words which are present in the definition of 'decision' in my view are 'cause or matter'. I should note that the Court of Appeal in *Tycoon Realty* and a catenation of cases which adopted and accepted the way s 67(1) of the Act was read by the said court, as well as the Federal Court in *Kempadang* inadvertently omitted to consider the expression 'cause or matter' and in the process overlooked the significance of these words in the context of the subject under consideration (see *Silver Concept Sdn Bhd v Brisdale Rasa Development Sdn Bhd (formerly known as Ekspedisi Ria Sdn Bhd)* [2002] 4 MLJ 113 (CA); *Shorga Sdn Bhd v Amanah Raya Bhd (as administrator of the estate of Raja Nong Chik bin Raja Ishak, deceased)* [2004] 1 MLJ 143 (HC); *See Teow Chuan &*

Anor v Dato' Anthony See Teow Guan [2006] 3 MLJ 97 (CA); *Kee Yeh Maritime Co Ltd v Coastal Shipping Sdn Bhd* [2000] MLJU 537 (HC) and *Raja Kumar A/l Andy & 2 Ors v Namgayee A/p Alagan & Anor* [2009] MLJU 320; [2009] 5 CLJ 189 (CA)). I shall not, however, venture to conjecture what opinion the courts in the above cases would express had they considered the said relevant key words and other related words as defined in the Act, but for reasons which I shall state thereafter, the more sensible and correct interpretation on the extend of the application of the definition of the word 'decision' would be that it applies to both civil and criminal appeals.

[122] It is entirely clear that the word 'cause' is also defined in s 3 of the Act to include:

> ... any *action, suit* or *other original proceedings between a plaintiff and defendant*, and any criminal proceedings; (Emphasis added.)

The word 'matter' is defined in s 3 of the Act in the following terms:

> 'matter' includes every proceeding in court not in a cause;

Had both the Court of Appeal and this court in the above cases considered the definition of the word 'cause' it would not have escaped their attention that the word 'action' appearing therein is also defined in s 3 as follows:

> 'action' *means a civil proceeding* commenced by writ or in such other manner as is prescribed by rules of court, but does not include a criminal proceeding; (Emphasis added.)

I should say in this regard that the expression 'cause or matter' is also used in sub-s 67(1) which has been reproduced earlier. There is furthermore on the face of the Act, a definition of the word 'proceeding' which is used in the definitions of 'action', 'cause' and 'matter' and it reads:

> 'proceeding' means any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding;

[123] Upon careful scrutiny of the wording of the above provisions in order to glean the true legislative intention therefrom, it is plain that the definition of 'decision' in s 3 applies to both civil and criminal appeals. In the case of *Mukhtiar Singh Gill & Ors v Atma Singh Gill* [1989] 1 MLJ 97, it was held that reading the definitions of 'cause', 'matter' and 'action' in s 3 of the Act, the word 'cause' included any action in a civil proceeding including applications at any stage of a proceeding. It is also said, and here I would quote from para [3.2] of the *Malaysian Court Practice: Appellate Courts*, that in its natural meaning, "action' refers to any proceedings in the nature of a litigation between a plaintiff

A and a defendant, it includes any civil proceedings in which there is a plaintiff who sues, and a defendant who is sued, in respect of some cause of action, as contrasted with proceedings, such as statutory proceedings which are embraced in the word 'matter'. At common law, an action is a proceeding at law by which one party sought in court to enforce a right against, or to restrain a wrong, by another party'.

B

[124] I find it necessary to observe at this stage that the point made by the respondent in *Kempadang* and was answered by the Federal Court in the manner described above was not raised for the first time. In 2002, the question of whether the definition of the word 'decision' was limited to criminal appeals only was considered by the High Court in *Seabance Ge Capital Sdn Bhd lwn Dynabuilders Sdn Bhd dan satu lagi* [2002] 5 MLJ 152 wherein it was held that the definition of the word 'decision' was not limited to decisions made in criminal cases only. The words 'cause or matter' were wide enough to include civil as well as criminal cases. I entirely agree with this decision as correctly stating the legal position.

C

D

[125] It has been suggested that the word 'decision' is not used in sub-s 67(1) of the Act and such absence renders the definition of the word 'decision' not applicable to civil appeals. While it cannot be denied that the word 'decision' is absent from sub-s 67(1) of the Act, I cannot however read the said section in isolation for the manifest reason that the entire provisions upon which the appellate jurisdiction of the Court of Appeal relating to civil appeals rests must be collectively considered. When this is undertaken, I have no real doubt that not only that the expression of 'judgment or order' is used in sub-s 67(1) but the word 'decision' is also used no less than three times in sub-ss 68(3) and 69(2) and (5) of the Act.

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[126] The presence of the word 'decision' in sub-ss 68(3), 69(2) and (5) and the words 'cause or matter' in the definition of 'decision' cannot be overlooked or dismissed as being insignificant for Parliament does not legislate in vain by the use of meaningless words and phrases. The court recognises that Parliament actually does nothing in vain. This court being an interpreter is therefore not entitled to disregard or ignore words used in a statute or to treat them as superfluous or insignificant. Prima facie, every word appearing in a statute must bear some meaning. If I need to look at the authority on the principle of law on this point, this court in the case of *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94; [1997] 1 CLJ 636 is reported to have said:

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> The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of

meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:

> As a general rule a court will adopt that construction of a statute which will give some effect to all of the words which it contains, per Gibbs J in *Beckwith v R* [1976] 12 ALR 333 at p 337.

[127] I am also mindful of another salutary principle of statutory construction. It is clear and is rightly accepted thus far that a statute has to be read in the correct context and the interpretation of the meaning of the statutory words used should coincide with what Parliament means to say. The Federal Court in *Generation Products Sdn Bhd v Majlis Perbandaran Klang* [2008] 6 MLJ 325; [2008] 5 CLJ 417 on this point said:

> I am drawn to the House of Lords judgment of Lord Simon of Glaisdale, in *Farrel v Alexander* [1976] 2 All ER 721 at pp 735–736, where he discussed the question of reading the statute in the correct context:
>
> > Since the draftsman will himself have endeavoured to express the parliamentary meaning by words used in the primary and most natural sense which they bear in that same context, the court's interpretation of the meaning of the statutory words used should thus coincide with what Parliament meant to say.
> >
> > ...
> >
> > The first or 'golden' rule is to ascertain the primary and natural sense of the statutory words in their context, since it is to be presumed that it is in this sense that the draftsman is using the words in order to convey what it is that Parliament meant to say. They will only be read in some other sense if that is necessary to obviate injustice, absurdity, anomaly or contradiction, or to prevent impediment of the statutory objective. It follows that where the draftsman uses the same word or phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning.

[128] Reverting to the appeal before us, the starting point for this court to consider must always be what the Act in particular those provisions adverted to above actually says. Where these provisions are not clear, careful scrutiny of the wording may be necessary in order to glean Parliament's intention. However, in this appeal having carefully and meticulously scrutinised the wording of these provisions, I can say with utmost confidence that in the context that those words that I have considered are used in the Act, what Parliament means to say is overwhelmingly clear and unequivocal in that the definition of the word 'decision' evinces the intention that it applies to both criminal and civils appeals. I must stress that in coming to this decision the literal or plain meaning rule of interpretation cannot be ignored. In fact, the application of this rule of interpretation to the cold print of these relevant provisions is a reliable and

correct approach that would obviously show the intention to be ascribed to the word 'decision' in s 3 of the Act.

[129] I agree with the approach and the conclusion reached by this court in *Kempadang* that the scope of a 'decision' in s 3 of the Act is not excluded from sub-s 67(1) and that both sections must be read together. On the contrary and with due respect, it is obvious to my mind that there is a clear fallacy in the reasoning of the Court of Appeal in *Tycoon Realty Sdn Bhd* as highlighted earlier and such fallacy occurred because of its manifest failure to give due regard to the various provisions alluded to above. The decision of that court in *Tycoon Realty Sdn Bhd* and several other cases which followed the said decision as highlighted earlier cannot therefore be considered as the authority that convincingly supports a contention that the definition of the word 'decision' in s 3 is excluded by sub-s 67(1) of the Act.

[130] It may perhaps be noted that, for criminal matters, case authorities clearly show the consistent stand of the appellate courts that the ordinary meaning of the definition of 'decision' in s 3 of the Act proscribes the Court of Appeal from hearing appeals against rulings made in the course of a trial or a hearing which do not finally dispose of the rights of the parties. It is thus not the intention of Parliament that any decision of the High Court on any matter would be appealable to the Court of Appeal (*Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v Public Prosecutor* [2014] 6 MLJ 831; *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321; *Dato' Seri Anwar bin Ibrahim & Anor v Public Prosecutor* [2000] 3 MLJ 638 and *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 5 MLJ 535). I should observe that the above proposition should apply equally to civil appeals.

[131] Let me now turn to the respondent's point that s 68 contains provisions limiting appeals to the Court of Appeal. In other words, the section imposes a limitation on the jurisdiction of the Court of Appeal to hear and determine civil appeals conferred by sub-s 67(1) of the Act. Section 68 is enacted to the effect that the following matters are not appealable to the Court of Appeal:

> 68 Non-appealable matters
>
> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
>
> (a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal;
>
> (b) where the judgment or order is made by consent of parties;
>
> (c) where the judgment or order relates to costs only which by law are

left to the discretion of the Court, except with the leave of the Court of Appeal; and

(d) where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final.

(2) (Repealed).

(3) No appeal shall lie from a decision of a Judge in Chambers in a summary way on an interpleader summons, where the facts are not in dispute, except by leave of the Court of Appeal, but an appeal shall lie from a judgment given in court on the trial of an interpleader issue.

[132] In view of the above provisions, it is quite correct and reasonable to imply that matters that are non-appealable in civil cases are expressly provided for in s 68 of the Act. However, in my view, it is incorrect to assume that the definition of the word 'decision' does not apply to civil appeals since matters that are non-appealable are already expressly provided for under s 68 of the Act. I should emphasise further that s 68 of the Act does not exhaustively define the types of matters that are not appealable. While it cannot be denied that s 3 may be an interpretation section of the Act, that does not preclude Parliament in the exercise of its legislative authority and within its legislative competence under the Federal Constitution, from providing an additional exclusion of the matters that cannot be appealed against in a different fashion that is, by enacting the excluding clause in the definition of the word 'decision' in interpretation section. The reason why it is enacted in that fashion is not difficult to fathom and it is this. The exclusion of appeals against non-final decisions, as shown above, is clearly intended to apply to both civil and criminal appeals and to achieve that overarching objective, it would be convenient to enact one common provision that would apply to both types of appeals.

[133] The correct approach in my view is to read s 68 with the definition of 'decision' in s 3 of the Act in stating the matters that are not appealable to the Court of Appeal in civil cases. When these words are read with s 67 of the Act, such a 'decision', 'judgment' or 'order' which falls within the exclusionary words in the definition of the word 'decision' is without any doubt not appealable to the Court of Appeal.

[134] The Federal Court in *Kempadang* dealt with this point in para [26] accepting that another restriction could be discerned from the provisions of s 3 of the Act and that it acts as an additional exclusion of the types of matters that cannot be appealed against. The Federal Court's finding on this reads as follows:

[26] Civil matters which are not appealable to the Court of Appeal are listed in sub-s 68(1). For instance, there can be no appeal against a judgment or order made by

consent of parties or a judgment or order which has been declared final by a statute. Another restriction to appeal can be discerned from the provision of s 3 of the CJA when it qualifies the word 'decision' as opposed to a 'ruling' of the court.

[135] It is important to realise that reading s 68 with s 3 of the Act to limit the jurisdiction of the Court of Appeal to hear and determine civil appeals would accord with the accepted legal position that the Court of Appeal's jurisdiction under the Federal Constitution is to be given a 'narrow and strict' interpretation. This is the principle laid down by the Federal Court in *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173 when it construed s 68(1)(d) of the Act. *Dr Koay Cheng Boon*'s case concerned a challenge against the constitutionality of s 68(1)(d) of the Act which provides that the Court of Appeal does not have the jurisdiction to hear appeals against High Court judgments or orders declared to be final under written law. The Federal Court held that s 68(1)(d) was constitutional and consistent with art 121(1B) of the Federal Constitution.

[136] Article 121(1B) of the Federal Constitution defines the jurisdiction of the Court of Appeal as follows:

> 1(B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and
>
> (b) such other jurisdiction as may be conferred by or under federal law.

The Federal Court in holding that the Court of Appeal's jurisdiction, by virtue of art 121(B) was to be given a narrow reading said:

> [10] In answering the questions posed it is necessary that we first ascertain the meaning of the word 'jurisdiction' in the context of art 121(1B) of the Federal Constitution. *I am of the view the word 'jurisdiction' in art 121(1B) of the Federal Constitution should be given a narrow and strict meaning, namely that the said article merely confers on the Court of Appeal the authority and power to hear and determine appeals*. Article 121(1B) (a) of the Federal Constitution does not provide for the Court of Appeal to hear 'air' or 'any' appeals from the High Court. On this point I would refer to the case of *Tan Sri Eric Chia Eng Hock v Public Prosecutor* [2007] 2 MLJ 101 wherein Augustine Paul FCJ, inter alia, held that the word 'jurisdiction' in art 121(2)(a) of the Federal Constitution is to be given a narrow and strict meaning as regards the court's authority and power to hear and determine appeals and not to be construed in a wide sense to mean as to how the court's power to hear and determine appeals is to be exercised. (Emphasis added.)

[137] In consonance with its narrowly defined jurisdiction, it was held by the Federal Court in *Dr Koay Cheng Boon* that the Court of Appeal is not empowered to enlarge its jurisdiction and any appeal in excess of its jurisdiction would be incompetent:

> [52] *Being a creature of statute, the Court of Appeal has no power to enlarge its jurisdiction. Since the decision of the High Court under s 31(2) of the Act is final, the Court of Appeal has no power to enlarge its jurisdiction by hearing such an appeal. Such an appeal before that court would be incompetent. For the aforesaid reasons, I would hold that the decision of the Court of Appeal in the instant appeal, vis, that it did not have the jurisdiction to hear the appeal by the appellant is correct*. The Court of Appeal properly appreciated the applicable law to arrive at a judicious decision. (Emphasis added.)

Accordingly I fully accept the argument advanced by learned counsel for the appellant that interpreting sub-s 68(1) of the Act as not exhaustively defining the jurisdiction of the Court of Appeal would accord with the constitutionally entrenched principle that the Court of Appeal's jurisdiction is intended to be narrowly defined.

[138] I would thus read into s 68 of the Act a further exclusion to the jurisdiction of the Court of Appeal in the form of the definition of 'decision' in s 3 of the court. The terms 'judgment' or 'order' in s 3 of the Act should be transposed into s 68 of the Act in stating the matters that are not appealable to the Court of Appeal. It is a settled rule of statutory interpretation that the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found within the statute itself. This established rule was stated in the oft-quoted House of Lords decision of *Vickers, Sons and Maxim Limited v Evans* [1910] AC 444. Lord Loreburn's statement of principle on the point reads as follows:

> The appellants' contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself ...

The principle in *Vickers* has been cited repeatedly by the apex court in this jurisdiction when interpreting statutory provisions (see, as examples, the Supreme Court in *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449 at p 450 and the Federal Court in *Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor* [2007] 6 MLJ 581 at para [18]).

[139] The reason for reading the additional exclusion to the jurisdiction of the Court of Appeal is within the four corners of the Act in the form of the definitions of 'decision', 'cause', 'matter', 'action' and 'proceeding' as well as the presence of the words 'judgment' and 'order' in the definition of 'decision' and

ss 67–68 of the Act. To decline to read s 3 as instilling an additional exclusion of the appellate jurisdiction of the Court of Appeal would render as meaningless the definition of 'decision' which includes 'judgment' or 'order' in s 3 of the Act. This would offend the rule that permits additional words to be read into statutory provisions to prevent an absurdity from resulting *United Overseas Bank (M) Sdn Bhd v UJA Sdn Bhd* [2009] 6 MLJ 857 at para [6]).

[140] This approach would also accord with the settled rule of statutory interpretation that provisions of a statute must be read harmoniously and conjunctively (*All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 (FC)). There is, furthermore, by reading s 68 with ss 3 and 67 of the Act, a comfortable assurance that the legislative objective behind the definition of the word 'decision' in s 3 of the Act will be upheld and given effect to. This is pertinent because another established rule of statutory construction is that the statutory provision in question should be read in a manner that promotes or can ascertain the legislative intent behind the exclusionary clause (*Gula Perak Bhd v Datuk Lim Sue Beng & other appeals* [2018] MLJU 2107 (FC)).

[141] The interpretation rendered by this court in *Kempadang* in para [32] is consonant and consistent with Parliament's intention in amending the word 'decision' in s 3 of the Act. The objective that underpins the definition of 'decision' in s 3 is stated to be the need to promote the expeditious disposal of cases at the appellate stage and to filter appeals as to prevent the appellate courts from being inundated with appeals and to prevent delays in the administration of justice. In fact, the underlying reasons for the limiting clause were reflected clearly in the speech of the minister during the Second Reading of the Courts of Judicature (Amendment) Bill 1998 as reported in Hansard of which this court is entitled to refer as an aid to interpretation:

> Tuan Yang di-Pertua, selaras dengan hasrat kerajaan untuk memberikan satu sistem pentadbiran keadilan yang cekap kepada orang ramai, maka *beberapa tatacara tertentu di bawah Akta Mahkamah Kehakiman 1964 yang telah dikenal pasti sebagai antara faktor yang menyumbang kepada kelewatan proses pentadbiran keadilan di mahkamah adalah dicadangkan supaya dipinda*. Pindaan adalah dicadangkan untuk dibuat kepada seksyen-seksyen 3, 10, 42, 44, 78, 80, 96 dan 97 Akta Mahkamah Kehakiman 1964. *Ia adalah dibuat dengan tujuan untuk mempercepatkan proses pendengaran kes-kes di mahkamah* atasan khususnya Mahkamah Persekutuan dan Mahkamah Rayuan.
>
> Alasan-alasan pindaan secara terperinci adalah seperti berikut:
>
> (i) Pindaan kepada seksyen 3 adalah melibatkan *penggantian, takrif 'decision'*, dengan izin, *supaya ia tidak meliputi keputusan yang tidak membuat penentuan muktamad tentang hak pihak dalam sesuatu perbicaraan*. (Emphasis added.)

[142] It follows from the above that I see no reasons to be persuaded by the

suggestion made by learned counsel on his submission on behalf of the respondents that the High Court's decision pursuant to O 20 r 5 of the Rules of Court 2012 is not appealable on the ground that such decision is not included in the list of non-appealable matters in sub-s 68(1) of the Act. Neither am I amenable to any suggestion that the word 'decision' as defined in s 3 of the Act does not extend to civil appeals. In my judgment, it is undoubtedly clear that the word applies to both civil and criminal appeals. It actually says that in cold print of the provisions discussed above. Such interpretation is consistent with overarching purpose of the amendment to the word 'decision' in 1998 as proclaimed in *Hansard*. With the Federal Court clarifying the relationship between ss 3 and 67 of the Act in *Kempadang* and as further explained in *Hansard*, it is clear that Parliament could not sensibly have intended to restrict the definition of 'decision' to criminal appeals only. I should say that a disjunctive reading of these provisions would result in an anomalous situation where it would allow parties in civil matters to circumvent the restriction imposed by the definition of 'decision' in s 3 of the Act and thereby appeal against every decision of a trial court which would indisputably delay the smooth and speedy administration of justice. In my judgment, a reading contrary to that rendered by this court in *Kempadang* would in effect reinstate the very mischief the Courts of Judicature (Amendment) Act 1998 (Act A1031) is designed to remedy and to cause the definition of 'decision' in s 3 of the Act to become ineffectual or a dead letter, hence defeating the purpose for which the excluding clause in the definition of 'decision' is intended to achieve.

[143] It cannot be the intention of Parliament to disregard the application of the definition when interpreting ss 67–68 of the Act. Any suggestion to construe these provisions in this manner will result in absurd consequences. It is settled rule of interpretation that if a construction will lead to some absurdity or some repugnance or inconsistency with the rest of the statutory provision, it may be departed from so as to avoid that absurdity or inconsistency (see *Grey and others v Pearson and others* [1843–60] All ER Rep 21; (1857) 6 HL Cas 61; *All Malayan Estate Staff Union*).

[144] The respondents have purported to erroneously draw a distinction between s 68 of the Act and the equivalent provision in the Singapore Supreme Court of Judicature Act. On their behalf, learned counsel makes much of the fact that s 68 of the Act does not expressly include decisions in amendment applications as part of its provisions, unlike sub-s 34(1) read with para 1 of the Fourth Schedule of the Singapore statute. Subsection 34(1) read with para 1(i) of the Fourth Schedule of the Singapore Supreme Court of Judicature Act states that orders granting leave to amend a pleading are not appealable to the Court of Appeal. The provisions now provide relevantly:

34 Matters that are non-appealable or appealable only with leave

(1) An appeal cannot be brought to the Court of Appeal in any case specified in paragraph 1 of the Fourth Schedule except where provided in that Schedule.

...

FOURTH SCHEDULE

Section 34(1), 80(2A)(i) and 83

CASES THAT ARE NON-APPEALABLE

1. Subject to paragraph 2, an appeal cannot be brought to the Court of Appeal in any of the following cases:

...

(i) where a Judge makes an order giving leave to amend a pleading, except if —

(i) the application for such leave is made after the expiry of any relevant period of limitation current at the date of issue of the writ of summons; and

(ii) the amendment is an amendment to correct the name of a party or to alter the capacity in which a party sues, or the effect of the amendment will be to add or substitute a new cause of action;

All that I need to say on this point is that it is inaccurate and unhelpful to draw such an analogy because the Singapore Supreme Court of Judicature Act does not contain a definition of the word 'decision' which contains the excluding clause that has the effect of limiting the type of matters appealable from the High Court.

[145] I deal with the second and last core issue. The appellant submits that the High Court's decision that allowed their amendment application in part is not appealable by virtue of s 3 read with sub-s 67(1) of the Act the reason principally being that the said decision constitutes a ruling made in the course of a trial that does not finally dispose of the rights of the parties. The appellate courts have accepted that a decision made in an amendment application is not appealable to the Court of Appeal where such decision falls within the excluding clause of the definition of the word 'decision' in s 3 of the Act. The Court of Appeal, speaking through Justice David Wong JCA (now CJ (Sabah and Sarawak), in *Christopher ak Bandi @ Josny v Tumbung ak Nakis & Anor (Jamil bin Sindi, third party)* [2016] 4 MLJ 100 dismissed an appeal against a refusal to grant an amendment application in the course of a trial. His Lordship's rationale for doing so was that the decision on the amendment application was not a 'decision' as defined in s 3 of the Act and was therefore not appealable to the Court of Appeal. The following was His Lordship's finding on the matter:

[15] In our considered view, there is no doubt that a decision on an application to

amend the writ of summons and statement of claim, as it is here, is a decision made during the course of the trial which does not finally dispose of the rights of the parties, and therefore is not a decision within the meaning of s 3 of the CJA. The two ingredients of s 3 of the CJA had been complied with and hence we find that the factual matrix here is on all fours with *Datuk Seri Tiong King Sing* case.

...

[19] Reverting to the matter before us, to concede to the contention that the appeal before us is appealable, in our view, would no doubt give a party an extra bullet, so to speak, to delay an expeditious trial and would also be inconsistent to the jurisprudence of the present regime of civil procedure ... (Emphasis added.)

[146] It is necessary to state that *Christopher ak Bandi* was cited with approval by the Federal Court in para [54] in *Kempadang*, which accepted the former case to have 'held that an application to amend pleadings filed in the course of a trial is a ruling within the context of s 3 and is thus non appealable'.

[147] The respondents have erroneously attempted to distinguish the Court of Appeal's decision in *Christopher ak Bandi* with the present appeal. This is because firstly, the factual matrix in *Christopher ak Bandi* are undeniably similar with the instant case as they both concern appeals arising out of amendment applications moved and decided upon during the course of trial. Secondly, the delay caused by the appeal against the dismissal of the amendment application in *Christopher ak Bandi* is analogous to the present case. The appellant has been deprived of the fruits of its litigation notwithstanding the conclusion of the trial on 23 January 2018 and the judgment on liability in favour of the appellant on 14 December 218. As it stands, the assessment proceedings had been fixed for case management before the High Court pending the disposal of this appeal. Lastly, it is inconsequential as to whether the amendment applications were allowed or dismissed. The principle expounded in *Christopher ak Bandi* is concerned with the effect of and the juncture at which such applications are made. The excluding clause in the definition of 'decision' in s 3 being crystal clear, any decision that do not finally dispose of the rights of the parties and are made in the course of trials are non-appealable in order to avoid proceedings from being stalled.

[148] Further, the Federal Court authorities on amendment applications relied on by the respondents can be distinguished from the present appeal. In *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324; [1983] CLJ Rep 300 the case was decided before the definition of 'decision' in s 3 of the Act was amended by Act A1031 to add the excluding clause thereto. Next, the amendment application in *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301; [2015] 8 CLJ 1 was made on the eve of trial. I fully accept that any application which is made at such a juncture are not caught by s 3 of the Act and are therefore appealable (see *Wong Kie Chie & Ors*

v Kathryn Ma Wai Fong (as the personal representative, executrix and trustee of the estate of the late Wong Kie Nai) & Anor and other appeals [2017] 3 MLJ 350; [2017] 5 CLJ 707).

[149] Accordingly, I have no difficulty in holding that the present position in the law clearly shows that an appeal does not lie against a decision in an amendment application made in the course of trial as is in the instant action, and moreover, such a decision does not finally dispose of the rights of the parties. There is in my judgment no basis in the respondents' contention that the High Court's decision is appealable as it is a ruling made in the course of hearing the interlocutory application but rather a decision made at the conclusion of the hearing of the said application on its merits. Yet to my mind the respondents have obviously misconstrued the definition of 'decision' in s 3 in the context of s 67 of the Act. What characterises as being a decision as being appealable or otherwise is not only confined to a question of whether a ruling has disposed of the final rights of the parties but also whether it is a decision made in the course of a trial or matter. Therefore, it matters not if the decision is made at the conclusion of the interlocutory application. The plain fact is that such interlocutory application was indisputably made and heard in the course of the trial of the instant suit. It was decided before the High Court delivered its judgment on liability.

[150] It does not escape my notice that the argument advanced by the respondents also harps on the issue of the alleged prejudice and grave injustice as they would not have an opportunity to defend against the appellant's claim of damages since the High Court had already decided in favour of the appellant on the issue of liability. I do not agree with learned counsel's contention on this point. Presently, the assessment of damages proceeding has not been heard yet. The matter thus far remains at the stage of case management only. In the event the Court of Appeal's order is set aside in this appeal, the matter would be remitted back to the High Court for the hearing of the assessment of damages where the appellant would be required to prove their claim for the quantum of damages as stated in the amended pleading. The respondents would surely have the full opportunity to present their case in answer to the appellant's claim for damages sought by way of the amendments allowed by the High Court.

[151] The exclusion of appeals against non-final decisions is intended to prevent delays to trials occasioned by appeals of this nature during the course of trial. Both learned counsel will realise of course that an aggrieved party would not be prejudiced or be deprived of any right to appeal by the filtering effect of the excluding clause in the definition of 'decision' as it would still be open to the respondent, being the aggrieved party, to raise the impugned ruling in the appeal proper which is pending before the Court of Appeal.

[152] The Federal Court in *Karpal Singh a/l Ram Singh v Public Prosecutor* [2012] 5 MLJ 293 made the following decision on the point:

> [18] From the above explanation it is obvious that Parliament is not oblivious to mid-stream appeals that tend to stall proceedings and delay speedy completion of cases. With justice not being served by unnecessary delays, what with the amended meaning of 'decision' being crystal clear, such technical appeals that have the effect of stalling hearings, are now things of the past ...
>
> ...
>
> [21] *A dissatisfied party is never deprived either of his right to appeal after the conclusion of a trial, in the event he feels aggrieved with the ruling made in the course of the trial, as that supposed error could be raised in the appeal proper ...* (Emphasis added.)

In other words, a decision to allow this appeal does not mean that the respondent have reached the end of the road on the matter in dispute in this appeal for they may raise the ruling of the High Court as part of their grounds of appeal (see *Datuk Seri Tiong King Sing* at p 854 para 14).

[153] Before closing, it is necessary to state that this judgment sets forth the opinion of the majority of the remaining members of the judicial panel of this court which is agreed to entirely by my learned brothers Azahar Mohamed CJ (Malaya) and Mohd Zawawi Salleh FCJ, having read this judgment and the conclusion reached in draft. I have also read the draft judgment of my learned brother David Wong Dak Wah CJ (Sabah and Sarawak). Having done so and with due respect, I am unable to agree with the learned judgment of His Lordship.

[154] Drawing all these threads running through this judgment together, the outcome, as clearly indicated above, is that the appellant is successful in all of their contentions. The High Court's decision to allow the amendment application is not appealable to the Court of Appeal. The appeal is incompetent in limine and as such could not be laid before the Court of Appeal as it is clearly precluded by law. Accompanying this conclusion is my decision that the appeal is allowed with costs to the appellant. The Court of Appeal's decision dated 5 January 2018 is set aside.

Appeal allowed with costs.

Reported by Kohila Nesan